21210

(17,606.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 183.

THE ST. PAUL GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF ST. PAUL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 2, 1900.

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1 To the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota:

Now comes the St. Paul Gas Light Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota and having its place of business in the city of St. Paul, in said State, by its attorney, Frank W. M. Cutcheon, and complains that in the records and proceedings, and also in the rendition of the judgment in a suit between said St. Paul Gas Light Company, plaintiff, and The City of St. Paul, defendant, in the supreme court of said State of Minnesota (said court being the highest court of law or equity in said State of Minnesota in which a decision could be had in said suit), notwithstanding it was contended and asserted by said plaintiff that under and by virtue of chapter 53 of the Special Laws of Minnesota 1856, being an act of the legislature of the Territory of Minnesota entitled "An act to incorporate the St. Paul Gas Light Company," approved March 1st, 1856, and the acceptance of said act by said plaintiff, and the action of said defendant thereunder in directing said plaintiff, by resolution of its board of aldermen and common council, to erect and light lamps in the streets of said defendant, and the action of said plaintiff in obedience to such orders in contracting for, furnishing, providing, laying, setting up, and keeping in good repair at its own proper expense and charge all the street posts and lamps and their pipes and meters (of the best quality of work and material) so directed to be erected and lighted, an irrevocable contract was formed between the State
2 of Minnesota and said defendant, upon the one part, and plaintiff, upon the other part, whereby defendant became bound to pay unto plaintiff interest at the rate of eight per cent. per annum upon the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of erecting and laying the same from the date of the furnishing of the same respectively to the date of the expiration of plaintiff's charter life, and that the right conferred upon plaintiff by said contract had vested in it and become its property prior to any of the acts or proceedings complained of by plaintiff in said suit, and that a certain resolution adopted by the common council of said defendant (approved by the mayor of said defendant on the twentieth day of August, 1897) under authority conferred upon defendant by acts of the legislature of said State of Minnesota which constitute the charter of the defendant city; which resolution reads as follows:

"Resolved, That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works.

"Resolved, further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts not now in service in said electric light district above referred to, and that

from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said
3 gas street lamp posts," was a law of said State of Minnesota impairing the obligation of plaintiff's said contract, and that said resolution and the acts and doings of the defendant thereunder operated to deprive plaintiff of its property without due process of law and without just compensation, and that said resolution and all acts of the legislature of the State of Minnesota which empowered said council to pass the same and all acts and doings of defendant thereunder had been in direct and necessary violation of section 10 of article 1 of the Constitution of the United States and of section 1 of article 14 of the amendments to said Constitution of the United States, a final judgment was rendered by said supreme court of Minnesota against said plaintiff upon the 12th day of December, A. D. 1899, wherein it was adjudged that said contract above set forth did not bind said defendant to pay interest to plaintiff upon the costs of any of the street lamps, posts, pipes, or meters furnished, as aforesaid, by plaintiff, except during such period as the same might be used in the service of defendant under contract between plaintiff and defendant, and that said resolution of the common council of said defendant did not impair the obligation of plaintiff's said contract, and also that said resolution and the acts and doings of defendant thereunder did not operate to deprive said plaintiff of its property without due process of law or just compensation, all of which appears in the records and pleadings in said suit, and is contrary to the provisions of section 10 of article I of the Constitution of the United States and section
4 1 of article XIV of the amendments to said Constitution of the United States, whereby manifest error has happened to the great damage of said plaintiff.

Wherefore said St. Paul Gas Light Company, plaintiff and respondent aforesaid, prays for the allowance of a writ of error and for such other process as may cause the decision of said supreme court of Minnesota to be reviewed and corrected by the Supreme Court of the United States.

F. W. M. CUTCHEON,
Attorney and of Counsel for St. Paul Gas Light Company, Plaintiff.

GEO. C. SQUIRES, *Of Counsel.*

Let writ issue.

CHAS. M. START,
Chief Justice Supreme Court of the State of Minnesota.

St. Paul, Minnesota, Dec'b'r 28, 1899.

5 [Endorsed:] 11741. Copy. Petition for writ of error to remove suit of St. Paul Gas Light Company, plaintiff, vs. City of St. Paul, defendant, to Supreme Court of the United States. Endorsed: Filed Dec. 28, 1899. Darius F. Reese, clerk.

6 STATE OF MINNESOTA:

Supreme Court.

ST. PAUL GAS LIGHT COMPANY, Plaintiff,
vs.
CITY OF ST. PAUL, Defendant.

On reading and filing the petition of the above-named plaintiff for a writ of error to the United States Supreme Court, and on motion of Mr. George C. Squires, of counsel for said plaintiff:

It is ordered that the said petition be, and the same is hereby, granted, and that a writ of error issue forthwith as prayed for in said petition.

Dated December 28th, 1899.

CHAS. M. START,
Chief Justice Supreme Court of the State of Minnesota.

7 [Endorsed:] 11741. State of Minnesota, supreme court. St. Paul Gas Light Co., plaintiff, *vs.* City of St. Paul, defendant. Order allowing writ of error.
Endorsed: Filed Dec. 28, 1899. Darius F. Reese, clerk.

8 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The St. Paul Gas Light Company, plaintiff, and The City of St. Paul, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or of a statute or of
9 a commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, St. Paul Gas Light Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,

you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof. that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States for the District of Minnesota.

Allowed by—
CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

10 STATE OF MINNESOTA, *ss:*

Supreme Court.

I hereby certify that this writ of error was duly served this 28th day of December, 1899, and that a true copy thereof was delivered to and lodged with the undersigned clerk of said court on said day.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of the State of Minnesota.

11 [Endorsed:] 11741, original. In the Supreme Court of the United States. St. Paul Gas Light Company, plaintiff in error, *vs.* City of St. Paul, defendant in error. Writ of error.
Endorsed: Filed Dec. 28, 1899. Darius F. Reese, clerk.

12 STATE OF MINNESOTA:

Supreme Court.

ST. PAUL GAS LIGHT COMPANY, Plaintiff,
vs.
CITY OF ST. PAUL, Defendant.

Certificate of Chief Justice.

I do hereby certify that in the above-named case there was drawn in question the validity of a resolution of the common council of said defendant approved August 20th, 1897, set forth in full in the complaint in said case, and referred to in the findings of fact made therein by the judge before whom said case was tried, and of the statutes of said State authorizing the adoption of the same, on the

ground that the same were laws of said State of Minnesota and repugnant to section 10 of article I of the Constitution of the United States, and that the decision of the court was in favor of their validity, and that said plaintiff also claimed that by said statutes, resolution, and the acts of the defendant thereunder said plaintiff had been deprived of a certain property right claimed by it without due process of law, and set up and claimed said right and immunity from such action under the fourteenth article of the amendments of the Constitution of the United States, and the decision of the
13 court was against said right and immunity.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

14 [Endorsed:] 11741, original. State of Minnesota, supreme court. St. Paul Gas Light Company, plaintiff, *vs.* City of St. Paul, defendant. Certificate of chief justice.
Endorsed: Filed Dec. 28, 1899. Darius F. Reese, clerk.

15 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To City of St. Paul, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The St. Paul Gas Light Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of St. Paul, in the State of Minnesota, this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

Service of the foregoing citation by copy and the exhibition to me of the original signature of Charles M. Start, chief justice of
16 the supreme court of the State of Minnesota, appended to the original thereof, was made this 28th day of Dec'b'r, 1899, and is hereby admitted.

St. Paul, Minnesota.

JAMES E. MARKHAM,
Attorney for Above-named City of St. Paul, Defendant in Error.

STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

On this 28th day of Dec'b'r, A. D. 1899, personally appeared before me, the subscriber and clerk of the supreme court of the State

of Minnesota, George C. Squires, and makes oath that he delivered a true copy of the foregoing citation to James E. Markham, attorney for The City of St. Paul, defendant in error named in said citation, at St. Paul, Minnesota, on this 28th day of Dec'b'r, 1899, and that he then and there exhibited to said James E. Markham the original signature of Charles M. Start, chief justice of the supreme court of the State of Minnesota, which is appended to said original citation.

GEO. C. SQUIRES.

Subscribed and sworn to this 28th day of Dec'b'r, A. D. 1899.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of Supreme Court of State of Minnesota.

[Seal Supreme Court.]

17 [Endorsed:] 11741, original. In the Supreme Court of the United States. St. Paul Gas Light Company, plaintiff in error, *vs.* City of St. Paul, defendant in error. Citation. Endorsed: Filed Dec. 28, 1899. Darius F. Reese, clerk.

18 In the Supreme Court of the United States.

ST. PAUL GAS LIGHT COMPANY, Plaintiff in Error,
vs.
CITY OF ST. PAUL, Defendant in Error.

Bond.

Know all men by these presents that we, the St. Paul Gas Light Company, as principal, and the National Surety Company, a New York corporation, as surety, are held and firmly bound unto the City of St. Paul in the full and just sum of one thousand dollars ($1,000), to be paid unto said City of St. Paul, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of December, A. D. 1899.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit pending in said court between said St. Paul Gas Light Company, plaintiff, and said City of St. Paul, defendant, a final judgment was rendered against said plaintiff, and the said plaintiff having obtained a writ of error from the Supreme Court of the United States and filed a copy thereof in the clerk's office of said court to reverse said judgment in the aforesaid suit, and a citation to said City of St. Paul, citing and admonishing it to be and appear before the Supreme Court of the United States, to be holden at Washington, on the 27th day of January, A. D. 1900:

Now, the condition of the above obligation is such that if
19 the said St. Paul Gas Light Company shall prosecute said writ of error to effect and answer all costs and damages and fully pay to said City of St. Paul, its successors or assigns, the full

amount of said judgment of said supreme court of the State of Minnesota if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

ST. PAUL GAS LIGHT COMPANY,
[SEAL.] By F. W. M. CUTCHEON, *Vice-President.*
Attest: J. P. CROWLEY, *Secretary.*

NATIONAL SURETY COMPANY,
[SEAL.] By KENNETH CLARK,
Resident Vice-President.
Attest: W. S. McCURDY,
Resident Ass't Secretary.

Signed, sealed, and delivered in the presence of—
H. H. MERRICK.
J. F. FITZPATRICK.

20 STATE OF MINNESOTA, } *ss:*
County of Ramsey, }

On this 28th day of December, A. D. 1899, before me personally appeared William S. McCurdy, resident assistant secretary of the National Surety Company, one of the above-named corporations, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the city of St. Paul; that he is the resident assistant secretary of said corporation, the National Surety Company; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is the corporate seal; that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as resident assistant secretary of said corporation by like authority, and the said William S. McCurdy further said that he is acquainted with Kenneth Clark, and knows him to be the resident vice-president of said company; that the signature of said Kenneth Clark subscribed to said instrument is the genuine handwriting of said Kenneth Clark, and was thereto subscribed by like order of the said board of directors and in the presence of him, the said William S. McCurdy, resident assistant secretary, and the said William S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] H. H. MERRICK,
Notary Public, Ramsey County.

It is hereby stipulated that the above and foregoing bond is in all matters and things sufficient, and that the same may be approved.

F. W. M. CUTCHEON,
Attorney for St. Paul Gas Light Company, Plaintiff in Error.
GEO. C. SQUIRES, *Of Counsel.*

JAMES E. MARKHAM,
Attorney for City of St. Paul, Defendant in Error.

21 Approved December 28th, 1899.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

22 STATE OF MINNESOTA,
Department of Insurance.

ST. PAUL, MINN., 12, 28, 1899.

I, J. A. O'Shaughnessy, insurance commissioner of the State of Minnesota, do hereby certify that the National Surety Company of New York is a corporation organized under the laws of the State of New York and is authorized under its charter to guarantee fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings required or permitted in actions and proceedings at law; that it appears to my satisfaction from sufficient evidence on file in my office of commissioner of insurance of said State of Minnesota that said corporation, the National Surety Company of New York, has furnished the same security which is required by law and the regulations of my department of life insurance companies under the provisions of sections 355 to 358, inclusive, of chapter 34, General Laws of the State of Minnesota of one thousand eight hundred and seventy-eight (1878).

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

J. A. O'SHAUGHNESSY,
[SEAL OF DEP'T OF INS.] *Insurance Commissioner.*

23 [Endorsed:] 11741. Copy. In the Supreme Court of the United States. St. Paul Gas Light Company, plaintiff in error, *vs.* City of St. Paul, defendant in error. Bond. Due service of this bond by copy thereof is hereby admitted this 28th day of December, 1899. James E. Markham, attorney for defendant in error.

Endorsed: Filed Dec. 28, 1899. Darius F. Reese, clerk.

24 In the Supreme Court of the United States.

ST. PAUL GAS LIGHT COMPANY, Plaintiff in Error,
vs.
CITY OF ST. PAUL, Defendant in Error.

Assignment of Errors.

And now comes The St. Paul Gas Light Company, the plaintiff in error above named, by Frank W. M. Cutcheon, its attorney, and says that in the record and proceedings of the suit aforesaid there is manifest error in this, to wit:

I. The supreme court of Minnesota erred in its decision of said suit in holding that the contract between the plaintiff in error and the defendant in error embodied in section 9 of chapter 53, Special

Laws of Minnesota 1856, being an act of the legislature of the Territory of Minnesota entitled "An act to incorporate the St. Paul Gas Light Company," approved March 1st, 1856, and formed by the passage and acceptance of said act, did not, in consequence of the adoption of the resolutions of the board of aldermen and common council of defendant in error directing plaintiff in error to erect and light lamps in the streets of said city, defendant in error, and the acts of plaintiff in error performed in obedience to said resolutions, obligate the defendant in error to pay to plaintiff in error an
25 interest of eight per cent. per annum upon the amount of the sum of the original cost of the lamps, lamp posts, pipes, and meters erected and furnished by plaintiff in error in obedience to said resolutions except for periods during which said lamps were actually in the service of defendant in error under contract for lighting the same between plaintiff in error and defendant in error.

II. The supreme court of Minnesota erred in its decision of said suit in holding that the said contract between the plaintiff in error and the defendant in error embodied in said section 9 of chapter 53, Special Laws of Minnesota 1856, and formed as aforesaid, did not obligate the defendant in error to pay to plaintiff in error an interest of eight per cent. per annum upon the amount of the cost of every lamp, lamp post, pipe, and meter erected in obedience to the order of defendant in error given, as hereinabove stated, for the whole period elapsing between the date of the erection and furnishing of such lamp, post, pipe, or meter and the date for the expiration of the term of the charter act of plaintiff in error, to wit, said chapter 53 of the Special Laws of Minnesota 1856.

III. The supreme court of Minnesota erred in its decision of said suit in holding that the resolution of the common council of said defendant in error approved August 20th, 1897, and set forth in full in the complaint herein, which read as follows:

"Resolved, That the St. Paul Gas Light Company be, and it is hereby, required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under
26 contract with said company, and which said lamps have been discontinued by order of the board of public works.

"Resolved further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts not now in service in said electric light district above referred to, and that from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts," is not a law of said State of Minnesota within the meaning of section 10, article 1, of the Constitution of the United States.

IV. The supreme court of Minnesota erred in its decision of said suit in holding that said resolution of the common council of defendant in error approved August 20th, 1897, does not impair the obligation of the said contract between plaintiff in error and defendant in error embodied in said section 9 of said chapter 53 of the Special Laws of Minnesota 1856, and formed as hereinabove set

forth, and that said resolution is not in conflict with the provisions of section 10, article I, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

V. The supreme court of Minnesota erred in its decision of said suit in holding that said resolution of the common council of defendant in error approved August 20th, 1897, and the acts of the legislature of the State of Minnesota empowering said common council to pass the same do not impair the obligation of the
27 said contract between plaintiff in error and defendant in error embodied in said section 9 of said chapter 53 of the Special Laws of Minnesota 1856, and formed as hereinabove set forth, and that said resolution and each and all acts of the legislature of said State of Minnesota empowering said council to pass the same are not in conflict with the provisions of section 10, article I, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

VI. The supreme court of Minnesota erred in its decision of said suit in holding that the said resolution of the common council of defendant in error approved August 20th, 1897, and the acts and doings of defendant in error thereunder did not deprive plaintiff in error of property, to wit, of the rights vested in it under said contract embodied in said section 9 of said chapter 53 of the Special Laws of Minnesota 1856, and formed as hereinabove set forth, without due process of law, and that said resolution and the acts and doings of defendant in error thereunder are not in conflict with the provisions of section I of article XIV of the amendments to the Constitution of the United States, which declares that no State shall deprive any person of property without due process of law.

VII. The supreme court of Minnesota erred in its decision of said suit and in its final judgment entered thereon, in this, that it gave effect to said resolution of the common council of said defendant in error approved August 20th, 1897, and the acts and doings of said defendant in error thereunder, which said resolution was in direct and necessary violation of said section 10 of article I
28 of the Constitution of the United States, and which said resolution and the acts and doings of defendant thereunder were in direct and necessary violation of said section I of article XIV of the amendments to the Constitution of the United States.

VIII. The supreme court of Minnesota erred in its decision of said suit in directing that the judgment of the district court of Ramsey county, Minnesota, theretofore entered in said suit be reversed, and directing that judgment be entered in said suit against said plaintiff in error and in favor of said defendant in error.

IX. The supreme court of Minnesota erred in this, that by the record aforesaid it appears that the judgment given by it, as aforesaid, was given for said defendant in error and against said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error against said defendant in error.

And the said St. Paul Gas Light Company, plaintiff in error,

prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that the judgment heretofore entered in said suit by the district court of the State of Minnesota for the county of Ramsey, in said State, be reinstated with all its original force and effect, and that plaintiff in error may be restored to all things which it has lost by occasion of the said judgment of said supreme court of Minnesota.

F. W. M. CUTCHEON,
Attorney for Plaintiff in Error.

GEO. C. SQUIRES, *Of Counsel.*

29 [Endorsed:] 11741. Copy. In the Supreme Court of the United States. St. Paul Gas Light Company, plaintiff in error, *vs.* City of St. Paul, defendant in error. Assignment of errors. F. W. M. Cutcheon, counsel for plaintiff in error. Geo. C. Squires, of counsel.

Endorsed: Filed Dec. 28, 1899. Darius F. Reese, clerk.

30 STATE OF MINNESOTA:

Supreme Court, October Term, 1899.

ST. PAUL GAS LIGHT COMPANY, Respondent,
vs.
CITY OF ST. PAUL, Appellant.

Assignment of Errors.

1. The court erred in finding as a conclusion of law that the defendant is under obligation by reason of the facts found by the court and reported in its decision to pay to the plaintiff quarterly, during the term for which the act of the legislature of March 1, 1856, entitled "An act to incorporate the St. Paul Gas Light Company," shall remain in force, to wit, to and including the 31st day of March, 1906, interest at the rate of eight per cent. upon the cost of the 3,362 street lamp posts set up and established by the plaintiff in the streets of the defendant city, and under the order of its common council.

2. The court erred in finding and deciding as a conclusion of law that upon the facts found by the court the plaintiff is entitled to judgment against the defendant for the sum of $1,604 51, and for its costs and disbursements in this action, and erred in finding and deciding that the plaintiff was entitled to judgment against the defendant for any sum or amount whatever.

3. The court erred in refusing to find and determine as a conclusion of law upon the facts found by it and embraced in its decision in this action that the defendant is entitled to judgment against the plaintiff to the effect that the plaintiff take nothing by this action.

31 4. The court should have found and determined as a conclusion of law upon the facts found that the plaintiff is not entitled to recover interest upon the original cost of the 672 gas

street lamps, the lighting of which was discontinued prior to January 1, 1897, under the provisions of the contracts between the parties, dated March 16, 1896, and March 16, 1897, respectively, and which contracts are more particularly set forth in folios 112 to 119 of the printed record herein. Its refusal to so find was error.

5. The court below erred in rendering judgment against the defendant for $1,638.95, damages and costs, or for any sum or amount whatever.

[Endorsed:] 11741. Assignments of error. State supreme court. Endorsed: Filed Sept. 12, 1899. Darius F. Reese, clerk.

32 STATE OF MINNESOTA:

Supreme Court, October Term, 1899.

STATE OF MINNESOTA, *County of Ramsey.*

District Court, Second Judicial District.

ST. PAUL GAS LIGHT COMPANY, Plaintiff,
vs.
CITY OF ST. PAUL, Defendant.

Complaint.

Now comes the above-named plaintiff herein, The St. Paul Gas Light Company, and for its complaint against the defendant above named, The City of St. Paul, respectfully shows to the court and alleges:

Plaintiff is a corporation duly organized and existing under the laws of the State and late Territory of Minnesota, and par-
33 ticularly that certain act of the legislature of the late Territory of Minnesota approved March 1, 1856, entitled "An act to incorporate the St. Paul Gas Light Company," and certain acts of said Territory and State amendatory thereof.

Defendant is a municipal corporation incorporated and existing under the laws of the State of Minnesota, and particularly under an act entitled "An act to reduce the law incorporating the city of St. Paul, in the county of Ramsey and State of Minnesota, and the several acts amendatory thereof, and certain other acts relating to said city, into one act and to amend the same," which act was approved March 5, 1874, and the acts amendatory thereof and supplemental thereto.

Plaintiff is engaged, and during all the times herein mentioned has been engaged, in the business of manufacturing gas for the purpose of providing light, heat, and power, and of supplying the same to its customers in the city of St. Paul, Minnesota.

After the passage of said act of March 1, 1856, plaintiff duly accepted the same, and within the period limited by another act of the legislature of the Territory of Minnesota, approved Feb. 13, 1857, and entitled "An act to amend an act entitled 'An act to in-

corporate the St. Paul Gas Light Company;'" that is to say, prior to the first day of December, 1857, plaintiff did perform all and every the acts and things required to be performed by it in said act of March 1, 1856, as conditions precedent to the vesting in it of the powers, rights and privileges conferred by said act of
34 March 1, 1856; and particularly did construct and lay more than one and one-half miles of main gas pipe, and was ready to furnish and was furnishing gas and fixtures to said city and the inhabitants of said city of St. Paul, so far as they could be supplied from or in connection with any of said lines of main pipe laid as aforesaid; and plaintiff has ever since in each and all respects complied with and conformed to the provisions of all said acts, and has now for more than forty (40) years furnished to said city of St. Paul and its inhabitants gas for the purposes of illumination, fuel and power at any and all times and at all places accessible from its mains. In order so to do, plaintiff has constructed extensive gas works in said city at great cost, which works it has been obliged frequently to alter and extend and several times to rebuild, at great expense, and has constructed and laid and from time to time replaced and enlarged main pipes in the streets of said city, having an aggregate length of more than one hundred and seventeen (117) miles, besides large numbers of service pipes. Said work has been constantly progressing and the investments necessary to effect the same have been constantly making ever since the passage of said act of March 1, 1856.

Plaintiff has, during the entire fifteen years last past, at all times furnished steam for heating and power purposes and electricity for the purpose of illumination and power to said city of St. Paul and the inhabitants thereof, and in so doing has constructed two
35 large electrical plants and many miles of pole lines and wires, as well as steam conduits and pipes, and has installed large amounts of electrical machinery and appliances, all at great expense to it. In effecting these things, defendant has from time to time invested in its various works, plants, mains, pipes and wires, and the property which it has been obliged to purchase and operate as incident thereto, very large amounts of money, aggregating many hundreds of thousands of dollars. Defendant is still operating its gas and electrical works and its system of pipes and wires and is still supplying gas, electricity and steam to said city of St. Paul and its inhabitants.

In and by section 9 of said act of March 1, 1856, which said act and section are still and always have been since the passage thereof in full force and effect, it was and is provided as follows, to wit:

"SEC. 9. That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: Provided, that whenever the corporation of the city of St. Paul shall, by resolu-

tion of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and
36 lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing the same."

In and by said act of March 1, 1856, and plaintiff's acceptance thereof, and the action thereon above set forth, there was formed as of the first day of March, A. D. 1856, an irrevocable contract between the State of Minnesota on the one part, and plaintiff upon the other, whereby it was agreed and provided that whenever the corporation of the city of St. Paul should by resolution of the board of aldermen or common council of said city, direct lamps to be erected and lighted in the streets of said city, plaintiff should furnish and provide, lay, set up and keep in good repair, the same and all thereof, and all necessary meters and pipes therewith connected, at its own proper expense and charge, provided only that plaintiff was not bound thereby to lay its pipes in places where the proceeds from the sale of gaslight would not be sufficient to defray the expense of furnishing the same; and that whenever plaintiff, acting under any such direction of said city, should have erected and lighted any lamps so ordered for the streets of said city,
37 said city of St. Paul should thereafter, during the life of plaintiff's said charter act, pay unto plaintiff quarterly interest at the rate of eight per cent. per annum upon the amount of the sum of the original cost of all said street lamps, lamp posts, gas meters and gas pipes erected or furnished as aforesaid, and the cost of laying and erecting the same.

At various times heretofore, and prior to Jan. 1, 1897, the corporation of the city of St. Paul has, by resolution of its board of aldermen or common council directed lamps and posts to be erected and lighted by plaintiff in the streets of said city of St. Paul, to the aggregate number of three thousand three hundred and sixty-two (3,362), and in each and every such case plaintiff has made contract for the lamps and posts so ordered, and has furnished, provided, laid, set up and kept in good repair, at its own proper expense and charge, all such street posts and lamps and the pipes and meters connected therewith or necessary to supply the same, all of the best quality of work and material at any such time in use, and had so done prior to Jan. 1, 1897.

The original cost of the purchase and erection of said three thousand three hundred and sixty-two (3,362) street lamps and posts and of the purchase and laying of the service pipes connected there-

with, was the sum of eighty-five thousand five hundred and thirty-nine dollars and fifty-three cents ($85,539.53), all of which had been absolutely paid and expended therefor by plaintiff prior to
38 Jan. 1, 1897. Except as hereinafter stated, plaintiff has ever since the installation of each of said 3,362 lamps supplied the same with illuminating gas and kept the same lighted nightly under express contract or contracts with said defendant so to do.

Prior to the year 1897 defendant had directed plaintiff to cease to light seven hundred and seventeen (717) of said 3,362 street lamps, and terminated the contract between plaintiff and defendant under which plaintiff had theretofore supplied gas thereto, and lighted the same, and plaintiff had ceased to light said seven hundred and seventeen (717) street lamps, and defendant had ceased to pay for the supply of gas thereto or the lighting thereof, except as hereinafter stated.

Between Jan. 1, 1897, and May 1, 1897, plaintiff supplied gas to and lighted, under contract between plaintiff and defendant, only two thousand six hundred and forty-five (2,645) of said 3,362 street lamps, while seven hundred and seventeen (717) of said 3,362 street lamps remained during said period last mentioned idle and unused.

Thereafter, and prior to May 1, 1897, said defendant city, by resolution of its board of aldermen and common council, directed plaintiff to erect and light forty-five (45) more street lamps and posts in the streets of said city, in locations other than those in which said 3,362 lamps above mentioned, or any of them, were
39 situate. Whereupon plaintiff, with the consent of defendant, removed forty-five (45) of said seven hundred and seventeen (717) street lamps and posts that were then and there disused as aforesaid, to the locations respectively at which defendant had so ordered plaintiff to erect and light such forty-five new street lamps, and erected said forty-five street lamps in such locations respectively and connected the same with its system of mains, and thereafter, and on May 1, 1897, lighted, and thereafter and during the whole of the remainder of said year 1897, continued to light, the same under an express contract between plaintiff and defendant. The cost of transferring said forty-five lamps and posts and the service pipes connected therewith, and of erecting and laying the same as aforesaid, all of which was paid by plaintiff prior to May 1, 1897, was the sum of one hundred and forty-seven dollars and eighty-one cents ($147.81).

From May 1, 1897, to Dec. 31, 1897, inclusive, plaintiff, under contract with the defendant as aforesaid, supplied gas to and kept lighted, twenty-seven hundred and ninety (2,790) of said thirty-three hundred and sixty-two (3,362) street lamps, while six hundred and seventy-two (672) of said thirty-three hundred and sixty-two street lamps were idle and unused. The sum of the original cost of said six hundred and seventy-two street lamps and the erection thereof and of the purchase and laying of the service pipes connected therewith, was at least the sum of seventeen thousand eight hundred and thirty dollars and seventy-five cents ($17,830.75).

40 On or prior to the first day of February, 1898, there became due and payable by said defendant to plaintiff, on ac-

count of the interest for the year 1897 upon the cost of said thirty three hundred and sixty-two lamps and posts and pipes therewith connected, installed by plaintiff as aforesaid prior to Jan. 1, 1897 the sum of six thousand eight hundred and forty-three dollars and twelve cents ($6,843.12); and on account of the interest for that portion of the year 1897, beginning with the first day of May of said year, upon the cost of transferring and erecting said forty-five lamps and posts and pipes therewith connected, installed by plaintiff as aforesaid, between the first day of January, 1897, and the first day of May, 1897, the sum of seven dollars and eighty-seven cents ($7.87),—that is to say, the aggregate sum of six thousand eight hundred and fifty dollars and ninety-nine cents ($6,850.99) all in accordance with the provisions of said act of March 1, 1856 above mentioned.

Heretofore, and prior to the twentieth day of August, 1897, the common council of said city of St. Paul, claiming to be authorized so to do under and by virtue of the acts of the legislature of said State of Minnesota which form the charter of said city of St. Paul as aforesaid, passed a certain resolution, which said resolution was approved August 20, 1897, and reads as follows, viz:

"Resolved, That the St. Paul Gas Light Company be and it is
hereby required forthwith to remove the gas street-lamp posts
41 in that portion of the city now lighted by electric light under
contract with said company, and which said lamps have been discontinued by order of the board of public works.

"Resolved, further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street-lamp posts not now in service in said electric light district above referred to, and that from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street-lamp posts."

On or about the first day of July, 1897, plaintiff demanded of defendant the payment of the interest for the six months next preceding said day at the rate of eight (8) per cent. per annum, upon the cost of said thirty-three hundred and sixty-two (3,562) street lamps and posts erected by plaintiff prior to Jan. 1, 1897, and interest for the two months next preceding said day, at the same rate, on the cost of the transfer and erection of said forty-five street lamps and posts to wit: the sum of three thousand four hundred and twenty-three dollars and fifty-two cents (3,423.52); and thereafter, and on or about the first day of January, 1898, plaintiff demanded of defendant the payment of the interest for the six months next preceding said day upon the original cost of said thirty-three hundred and sixty-two (3,362) street lamps and posts, and of the transfer and erection of said forty-five (45) street lamps and posts above mentioned, to wit, the sum of three thousand four hundred and twenty-
seven dollars and forty-eight cents ($3,427.48), and although
42 the payment of such sums and each of them has frequently been demanded by plaintiff of defendant, defendant has

wholly neglected and refused to pay either of said sums save and except as follows, to wit:

Upon the twentieth day of October, 1897, defendant paid unto plaintiff the sum of two thousand seven hundred and ten dollars and twenty-one cents ($2,710.21), and upon the eighteenth day of January, 1898, defendant paid unto plaintiff the sum of two thousand seven hundred and thirteen dollars and eighty-three cents ($2,713.83), on account of interest upon the original cost of the construction of said thirty-three hundred and sixty-two lamp posts and of the transfer and erection of said forty-five lamp posts, for the year 1897, but defendant has refused to pay unto plaintiff the balance of the interest due unto plaintiff as aforesaid, to wit, the sum of one thousand four hundred and twenty-six dollars and forty-six cents ($1,426.46).

Plaintiff further alleges that said resolution of said common council of said defendant city, approved Aug. 20, 1897, and above set forth, and all acts of the legislature of the State of Minnesota, if any there be, which empowered said council to pass same, and all acts and doings of defendant thereunder, are in direct and necessary violation of section 11, article I, of the constitution of the State of Minnesota and of section 10 of article I of the Constitution of the United States, and of section 1 of article XIV of the amendments to said Constitution of the United States.

43 Wherefore, plaintiff demands judgment against said defendant for the sum of one thousand four hundred and twenty-six dollars and forty-six cents ($1,426.46), with interest at the rate of seven (7) per cent. per annum upon the sum of seven hundred and twelve dollars and eighty-one cents ($712.81) from the first day of July, 1897, and upon the sum of seven hundred and thirteen dollars and sixty-five cents ($713.65) at the same rate from the first day of January, 1898, and for its costs and disbursements of this action.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Plaintiff, 404 *New York Life Bldg.*,
St. Paul, Minn.

Answer.

(Title of Action.)

Now comes the above-named defendant, and for its answer to the complaint of the plaintiff herein, admits that said plaintiff is a corporation, organized and existing under and by virtue of the act of the legislature of the late Territory of Minnesota, mentioned in folio two of the complaint herein; admits that the defendant is a municipal corporation, organized and existing under the laws of the State of Minnesota, and admits that plaintiff is, and during all the times stated in the complaint herein has been, engaged in the business of manufacturing gas for the purpose of providing

44 light, heat and power, and supplying the same to its customers in the city of St. Paul.

Defendant denies that it has any knowledge or information suf-

ficient to form a belief as to what portion, if any, if the gas mains and gas pipes of said company were laid in the streets in the city of St. Paul prior to the first day of December, 1857, but admits that for a number of years the plaintiff has been a manufacturer and seller of gas to the city of St. Paul and its inhabitants, and has constructed extensive gas works and laid mains in many of the public streets of the city, and has invested large sums of money in the construction of its works and in the laying of its gas pipes and mains in the streets of said city for the purpose of enabling it to manufacture and supply gas for illuminating, heating and other purposes.

Defendant admits that section nine of the act of the legislature of the Territory of Minnesota, entitled "An act to incorporate the St. Paul Gas Light Company," approved March 1, 1856, contains the language set forth in folios eight and nine of the complaint herein, and that after the passages of said act the plaintiff duly accepted the same.

Further answering, defendant admits that at various times and on various occasions prior to Jan. 1, 1897, extending over a period of thirty years last past, the common council has, by resolution, directed that various streets in the city of St. Paul be lighted by
45 gas, and on each of these occasions plaintiff, at the request of the proper officers of defendant city, erected street-lamp posts at the points and to the number ordered and required by said city to be placed in the streets so ordered to be lighted by gas, and connected the same with its pipes and gas mains, all at its own proper cost and charge, in the aggregate number of three thousand, three hundred and sixty-two, and from time to time during said period prior to Jan. 1, 1897, plaintiff and defendant have entered into written contracts, providing for the maintenance of said street lamps, and the supplying and lighting thereof with illuminating gas at a price and for a period specified therein.

Defendant further admits that prior to Jan. 1, 1897, it directed plaintiff to cease to light seven hundred and seventeen of the said street lamps, and thereupon plaintiff ceased to light the same, and defendant ceased to pay for the supply of gas thereto or the lighting thereof, except as in said complaint stated, and that between Jan. 1, 1897, and May 1, 1897, plaintiff supplied gas to and lighted, under contract between plaintiff and defendant, only two thousand, six hundred and forty-five of said street lamps, while seven hundred and seventeen thereof remained idle and unused during said period.

Defendant further admits that prior to May 1, 1897, defendant, by resolution of its board of aldermen and common council,
46 directed plaintiff to erect and light forty-five more street lamps and posts in the streets of said city, in locations other than those in which the three thousand, three hundred and sixty-two lamps, or any of them, were located, and thereupon plaintiff, with consent of defendant, removed forty-five of said seven hundred and seventeen street lamps and posts, which had been discontinued as aforesaid, to the locations at which defendant had ordered plain-

tiff to erect and light such forty-five new street lamps and posts, and that said plaintiff did erect said forty-five street lamps and posts in such locations, and connected the same with its system of mains, and on May 1st, and during the remainder of said year 1897, plaintiff continued to light said forty-five lamps under a contract between plaintiff and defendant, which said contract is hereinafter specifically alleged.

Defendant further admits that from May 1, 1897, to Dec. 31, 1897, inclusive, plaintiff, under contract with defendant, which said contract is hereinafter specifically alleged, supplied gas to and kept lighted two thousand, seven hundred and ninety of said three thousand, three hundred and sixty-two street lamps, while six hundred and seventy-two of said three thousand, three hundred and sixty-two street lamps were idle and unused and had been discontinued during said last-named period.

Defendant denies that it has any knowledge or information
47 sufficient to form a belief as to the original cost of the purchase, erection, or laying of any of the street lamps, posts, pipes, or meters alleged in said complaint, or of the original cost of transferring or erecting said forty-five lamps and posts, or laying the service pipes connected therewith.

Defendant denies that on the first day of February, 1898, or at any other time whatsoever, there became due the plaintiff from defendant the sums alleged in said complaint on account of interest upon the original cost of the purchase, erection, transferring and laying of said lamps, posts, pipes and meters for the year 1897, or any other sum or sums whatsoever.

Defendant further admits that on or before the twentieth day of August, 1897, the common council of defendant passed the resolution set forth in folios twenty and twenty-one of said complaint, and thereafter that said plaintiff made demand of the defendant for the sums of money alleged in said complaint, and that defendant paid to plaintiff at the times alleged in said complaint the sums therein set forth.

Further answering, defendant alleges that heretofore, to wit, on the seventeenth day of February, 1896, defendant, by and through its proper officer, advertised for bids or proposals to be submitted to it for a contract to furnish defendant with gas lighting according to certain specifications theretofore duly prepared and filed by the board of public works of defendant with the city clerk of defendant; that in pursuance of said advertisement, plaintiff duly sub-
48 mitted its bid or proposal for said contract; that plaintiff was then and there the lowest responsible bidder for said contract; that thereupon said bid or proposal came before the common council of defendant for consideration, and said bid or proposal was thereupon duly accepted by said common council, and thereafter and on the fourteenth day of March, 1896, a written contract was duly entered into between plaintiff and defendant in pursuance of said accepted bid or proposal, in and by which the said plaintiff covenanted and agreed with the defendant to furnish for the period of one year from and after the first day of April, 1896, a supply of

illuminating gas for at least three thousand and thirty-one street lamps then in the streets, alleys, lanes, landings, parks and other public places within the limits of defendant, and to maintain and light the same according to said specifications for gas lighting, which said specifications were attached to said contract and made a part thereof; and said plaintiff further agreed in and by said agreement to erect and supply with light upon the terms and conditions in said contract stated, all the street lamps that might thereafter be ordered by defendant to be placed upon any of the said streets, alleys, lanes, landings, parks or other public places during the period covered by said agreement; that for and in consideration of the furnishing of said gas, defendant agreed to pay to plaintiff a sum specified in said contract.

49 It was further provided in and by said specifications that defendant should have the right to decrease, from time to time during the period of said contract, the number of lamps in service, and to discontinue the lighting with gas of the whole or any portion of the street or particular number of streets, or any particular section of said city, and from and after the service by said defendant city upon said plaintiff of a written notice of discontinuance of any such lamp or lamps, said plaintiff should not be entitled to any compensation for the further lighting of the lamp or lamps so ordered to be discontinued, and the further right was reserved to defendant in said contract to remove any lamp or lamps from one location to another upon a written order of the board of public works, the cost of such removal to be paid by said defendant at such compensation as said board of public works might determine as equitable and just.

Defendant further alleges that said contract did not provide any way whatsoever for the payment of any sum as interest to plaintiff on the original cost of the purchase, erection and laying of any of the said lamps or posts, or the surface pipes or meters connected therewith theretofore purchased and erected by plaintiff within the period provided in said agreement, under the direction of defendant as therein provided.

Defendant further alleges that the said seven hundred and seventeen street lamps and posts hereinbefore admitted to have

50 been discontinued under direction of defendant were so discontinued and the lighting of the said seven hundred and seventeen lamps relinquished under and by virtue of the said provision in said contract and specifications, by which the right was reserved to the city to decrease from time to time any number of the lamps in service of the city, and said defendant, after so discontinuing said lamps and posts, duly gave notice to plaintiff of the discontinuance of the same.

Defendant further alleges that heretofore, to wit, in the month of March, 1897, the defendant by and through its proper officer duly advertised for bids or proposals for contract to furnish defendant with gas lighting, according to certain specifications theretofore prepared and filed in the office of the city clerk of defendant by the board of public works of defendant; that thereupon plaintiff duly

made its bid or proposal for said contract; that said plaintiff was then and there the lowest responsible bidder for said contract; that thereupon the common council of defendant duly considered said bid, and thereafter duly accepted said bid or proposal and awarded said contract to plaintiff; that thereupon and on the sixteenth day of March, 1897, plaintiff and defendant duly entered into a written agreement in and by which plaintiff covenanted and agreed to furnish to defendant, for a period of nine months from and after the first day of April, 1897, a supply of illuminating gas sufficient to light any number not exceeding three thousand and
51 thirty-one street lamps at the time of the execution of said contract in place in the streets, alleys, lanes, landings, parks and other public places within the limits of defendant, and to maintain and light the same according to the specifications for gas lighting attached to said contract, which said specifications were made a part thereof; and said plaintiff further agreed in and by said agreement to erect and supply with light, upon the terms in said contract stated, all of the street lamps that might thereafter be ordered by defendant to be placed upon any of the streets, alleys, lanes, landings, parks or other public places in said city during the period provided by said agreement, in consideration whereof defendant agreed to pay plaintiff for the furnishing of such gas a sum specified in said agreement; that in and by said last-named contract and specifications, the right was reserved to defendant to decrease from time to time, the number of lamps in service and discontinue the lighting by gas of the whole or any portion of any street or any particular number of streets, or any particular section of said defendant city, and that from and after the service of defendant upon plaintiff of the written notice of the discontinuance of any such lamp or lamps, plaintiff should not be entitled to any compensation for the further lighting of the lamp or lamps so ordered discontinued; that in and by said last-named contract and specifications the further right was reserved to said defendant to re-
52 move any lamp or lamps from one location to another upon written order of the board of public works, the cost of such removal to be paid by the city of St. Paul at such compensation as the board of public works, or other board or officer charged with such duty, might determine as equitable and just.

Defendant further alleges that under and in pursuance of the contracts aforesaid, between the first day of January, 1897, and the first day of May, 1897, the common council of the city of St. Paul duly passed a resolution directing plaintiff to remove and relocate forty-five of the said seven hundred and seventeen street lamps and posts, which had been discontinued as hereinbefore alleged; that thereupon the plaintiff did relocate and remove, in pursuance of said resolution, the said forty-five street lamps and posts, upon receiving an order or direction so to do from the said board of public works; that said board of public works or said common council or any other officer has never determined the cost of such relocation or removal, nor has said plaintiff ever demanded that said board or any other officer ever take any steps to determine the same.

Defendant further alleges that it has paid full and complete payment to the plaintiff of all sums becoming due on each of said contracts prior to the commencement of this action.

53 Wherefore, defendant demands judgment that plaintiff take nothing by this action, and for its costs and disbursements herein.

JAMES E. MARKHAM AND
CARL TAYLOR,
Attorneys for Defendant, Room 40 Court-house and City Hall, St. Paul, Minnesota.

Reply.

(Title of Action.)

Now comes the above-named plaintiff, and for its reply to the answer of the defendant, The City of St. Paul above named, respectfully shows unto the court:

Plaintiff admits the truth of all the allegations of said answer, beginning with the eighth line of the ninth folio thereof, except as to such of the same as are herein denied or otherwise replied unto.

Plaintiff alleges that in and by said contract in said answer mentioned, entered into on the fourteenth day of March, 1896, it was expressly provided as follows, viz:

"It is expressly understood and agreed that none of the terms or provisions of this contract are to be construed to annul or modify in any way the obligation of said City of St. Paul to pay to said St. Paul Gas Light Company interest at the rate of eight (8) per cent. per annum, payable quarterly, upon the original cost of the street lamps, lamp posts, gas meters, gas pipes and the cost of erect-

54 ing and laying the same, at any time provided by said St. Paul Gas Light Company for the service of said City of St. Paul, at the request and order of said City of St. Paul as provided by the terms of section nine (9) of the act of the legislature of the State of Minnesota constituting the charter of said St. Paul Gas Light Company as aforesaid;" and that in the introductory portion of said contract, as one of the recitals thereof, occurs the following language:

"Whereas, under and by virtue of the terms of section nine (9) of the act of the legislature of said State of Minnesota constituting the charter of said St. Paul Gas Light Company, party of the first part, said City of St. Paul, Minnesota, party of the second part, is under obligation to pay to said party of the first part interest upon the original cost of the street lamps, lamp posts, gas meters, gas pipes and the cost of erecting and laying the same, at any time provided by said party of the first part for the service of said party of the second part, at the request or order of said party of the second part, at the rate of eight (8) per cent. per annum, payable quarterly;" and that in and by said contract in said answer mentioned, entered into on the sixteenth day of March, 1897, it is expressly provided as follows:

"It is also expressly understood and agreed that none of the terms or provisions of this contract are to be construed to waive or modify in any way the claim of said company that said City of St. Paul is also under obligation to pay to said St. Paul Gas Light Company interest at the rate of eight (8) per cent. per annum, payable quarterly, upon the original cost of the street lamps, lamp posts, gas meters, gas pipes, and the cost of erecting and laying the same at any time provided by said St. Paul Gas Light Company at the request or order of said City of St. Paul, under the provisions of section nine (9) of the act of the legislature of said State of
55 Minnesota constituting the charter of said St. Paul Gas Light Company, it being understood that neither party to this contract by the execution hereof waives any of its rights or claims in reference thereto."

Plaintiff denies that the agreement of defendant to pay plaintiff the sum specified in said contracts respectively, for furnishing gas to such additional street lamps as might be required by said defendant under either of said contracts was made in consideration of, or was the consideration for, either in whole or in part, the agreement of plaintiff to erect such lamps upon direction of said defendant.

Plaintiff expressly denies the allegations contained in the first three lines of folio 20 of said answer.

Wherefore, plaintiff prays judgment as in its complaint herein already demanded.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Plaintiff.

Findings of Fact and Conclusions of Law.

The action above entitled came on for trial before the undersigned, one of the judges of said court, without a jury (a jury therein having been waived), at the May, 1899, general term of said court. F. W. M. Cutcheon appeared as attorney for the plaintiff therein, and Hon. James E. Markham, corporation attorney of said city of St. Paul, appeared as attorney for the defendant therein.
56 After reading the pleadings, hearing and examining the proofs, and hearing argument of counsel, I do find the facts herein to be as follows:

Findings of Fact.

Plaintiff is, and at all times herein mentioned or referred to has been, a corporation duly organized and existing under the laws of the State and late Territory of Minnesota, and particularly that certain act of the legislature of the late Territory of Minnesota approved March 1, 1856, entitled "An act to incorporate the St. Paul Gas Light Company;" and defendant is, and at all such times has been, a municipal corporation incorporated and existing under the laws of the State of Minnesota.

After the passage of said act of March 1, 1856, plaintiff duly accepted the same, and, prior to the first day of December, 1857, did

perform all and every the acts and things required to be performed by it in said act of March 1, 1856, as conditions to the vesting in it of all the powers, rights and privileges conferred by said act of March 1, 1856. Plaintiff is engaged, and during all the times herein mentioned has been engaged, in the business of manufacturing gas for the purpose of providing light, heat and power and of supplying the same to its customers in the city of St. Paul, Minnesota; and for more than forty years has furnished to the city of St. Paul and its inhabitants gas for the purpose of illumination, fuel and power, at any and at all times and at all places accessible from its mains. In order so to do, plaintiff has constructed extensive
57 gas works and laid mains and gas pipes in many of the streets of the city, and has invested large sums of money in the construction of its works and in the laying of its gas pipes and mains, and in other ways incident to its business. Plaintiff has, during the fifteen years last past, at all times produced and furnished steam for heating and power purposes and electricity for the purposes of illumination and power to said city of St. Paul and its inhabitants, and in so doing has constructed large electrical plants and many miles of pole lines and wires, as well as steam conduits and pipes, and has installed large amounts of electrical machinery and appliances, all at great expense.

In and by said act of March 1, 1856, and at all times since the passage of said act, it is and has been provided, among other things, as follows:

"SEC. 9. That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: Provided, that whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best qual-
58 ity of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing the same.

* * * * * * *

"SEC. 14. The corporation of the city of St. Paul and the board of directors of the St. Paul Gas Light Company may contract for

and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon, and they may make generally such contracts in relation to the business of the company as may be beneficial to them and the public.

"SEC. 15. This act shall be in force for the term of twenty-five years from and after the first day of January, in the year of our Lord one thousand eight hundred and fifty-seven, unless the company hereby incorporated shall sell and convey, within the said term of twenty years, their gas works, lands, rights and privileges, as herein provided, to the city of St. Paul; in which event said gas works and all rights, powers and privileges hereby granted shall be invested in the mayor, aldermen and citizens of St. Paul, or (in) their corporate capacity; and the said city shall have all the powers and be invested with all the rights and privileges of the individual stockholders, and also of all such as are invested in the president and directors of said company by virtue of this act; but should the said city not resolve to purchase at either of the times provided herein, then this act shall be in full force for an additional term of ten years from and after the last date mentioned for such sale and purchase, and no longer.

59 "SEC. 16. This act shall be in force from and after its passage, and shall be deemed a public act, and be favorably construed for the purposes herein expressed and declared in all courts and places."

At various times heretofore, subsequently to the performance by plaintiff of the conditions named in said act of March 1, 1856, to wit, during and subsequent to the year 1857 and prior to Jan. 1, 1897, the corporation of the city of St. Paul has from time to time, by resolutions of its board of aldermen and common council, directed lamps and lamp posts to be erected and lighted by plaintiff in the streets of said city of St. Paul to the aggregate number of 3,362, and in each and every such case plaintiff has contracted for and has furnished, provided, laid, set up and kept in good repair, at its own proper expense and charge, all such street lamps and posts and the pipes and meters connected with or necessary to supply the same, all of the best quality of work and material at any such time in use.

And except as hereinafter stated, plaintiff has, ever since the installation of each of said 3,362 lamps, supplied the same with illuminating gas and kept the same lighted nightly, under express contract or contracts with said defendant so to do, at a price and for a period specified in each of said contracts.

On the 14th day of March, 1896, the plaintiff and the defendant entered into a written contract for the furnishing of the necessary gas and lighting said gas street lamps for the period of one

60 year from April 1, 1896, a copy of which said contract is hereto annexed and marked "Exhibit A." The specifications recited in said contract contain the following provision, which is the only provision in said specifications in any way material to the issues between the parties in this action, to wit: "The district to be covered by gas lighting includes all the streets in the territory

now lighted by gas. The number of gas lights now in service and to be lighted and maintained until otherwise ordered is 3,031. The right, however, is reserved to said city to decrease, from time to time, the number of lamps in service, and to discontinue the lighting by gas of the whole or any portion of any street or particular number of streets, or any particular section of said city, and from and after the service by said city upon said contractor of written notice of the discontinuance of any such lamp or lamps, the contractor shall not be entitled to any compensation for the further lighting of the lamp or lamps so ordered discontinued." And on the 16th day of March, 1897, the plaintiff and the defendant entered into a further written contract for the furnishing of gas and lighting said street lamps for the period of nine (9) months from and after the first day of April, 1897, and the specifications incorporated into this contract contain the same provisions as to the district to be covered by gas lighting, the number of lamps in service and the right to decrease, from time to time, the number of lamps in service and dis-
61 continue the lighting thereof, as contained in the contract of March 14, 1896, hereinabove referred to, and also contain the following provision:

"It is also expressly understood and agreed that none of the terms or provisions of this contract are to be construed to waive or modify in any way the claim of said company that said city of St. Paul is also under obligation to pay to said St. Paul Gas Light Company interest at the rate of eight (8) per cent. per annum, payable quarterly, upon the original cost of the street lamps, lamp posts, gas meters, gas pipes and the cost of erecting and laying the same, at any time provided by said St. Paul Gas Light Company, at the request or order of said city of St. Paul, under the provisions of section nine (9) of the act of the legislature of said State of Minnesota constituting the charter of said St. Paul Gas Light Company, it being understood that neither party to this contract by the execution thereof waives any of its rights or claims in reference thereto."

Prior to the first day of January, 1897, the defendant directed the plaintiff to cease to light 672 of the 3,362 street lamps then in service, and terminated, as to said 672 lamps so ordered discontinued, the contract between the plaintiff and the defendant under which the plaintiff had theretofore supplied gas thereto and lighted the same, and plaintiff thereupon ceased to light said 672 lamps and defendant ceased to pay for the supply of gas thereto or the lighting thereof, and between Jan. 1, 1897, and Dec. 31, 1897, inclusive, plaintiff supplied gas to and lighted, under contract between plaintiff and defendant, only 2,690 of said 3,362 street lamps, while 672 of said 3,362 street lamps remained, during said
62 last-mentioned period, out of service, idle and unused, and the parties have made no further contract for the lighting thereof.

The original cost to plaintiff of the purchase and erection of said 3,362 street lamps and posts and of the pipes and meters appurte-

nant thereto was the sum of $85,539.53, all of which has been paid and expended therefor by plaintiff prior to said Jan. 1, 1897.

And the sum of the original cost of said 672 street lamps, and the erection thereof, and of the purchase and laying of the service pipes connected therewith, was the sum of $17,830.75.

The defendant duly paid unto the plaintiff, except as hereinafter stated, interest at the rate of 8 % per annum upon the original cost of each of said 3,362 street lamps and of the service pipes connected therewith and of the erection and laying of the same respectively for the whole period elapsing between the date of the erection and laying of such lamps and service pipes and the first day of January, 1897, and has at all times heretofore continued to pay interest upon the original cost of all the said lamps and the said service pipes, except the 672 discontinued, as aforesaid. By certain contracts made between the plaintiff and the defendant providing for the lighting of the streets of plaintiff during the years 1886 to 1890 and 1891, inclusive, the interest upon the cost of said 3,362 street lamps and their connections was by express provisions of said contracts expressly limited to the lives of said contracts respectively, reduced to
63 rates lower than 8 % per annum, in some instances 7 % per annum, and in one instance to 6 % per annum, and during the periods covered by said contracts respectively interest was paid by plaintiff to defendant at the reduced rates named in said contracts respectively. Each of said contracts contained, in addition to the provision making such temporary reduction of the said interest rate, a recital substantially identical with the recital as to the obligation of the defendant under section nine (9) of the plaintiff's charter, contained upon page 1 of Exhibit A, attached hereto.

The first claim made by defendant, that it was not under obligation to pay interest upon the original cost of all said 3,362 street lamps and their connections, and of laying and erecting the same, was made in and by a resolution of the common council of the defendant, approved Aug. 20, 1897, a true copy of which appears in folios 20 and 21 of the complaint herein.

On the first day of July, 1897, or immediately thereafter, plaintiff demanded of defendant the payment of interest for the six months next preceding said day, at the rate of eight (8) per cent. per annum, upon the cost of said 3,362 street lamps and posts erected by plaintiff prior to Jan. 1, 1897; and thereafter and on the first day of January, 1898, or immediately thereafter, plaintiff demanded of defendant the payment of interest for the six months next preceding said day, at the same rate, upon the original cost of said 3,362
64 street lamps and posts. Despite whereof defendant has wholly failed and refused to pay either of said sums, save and except as follows, to wit: Upon the twentieth day of October, 1897, defendant paid unto plaintiff the sum of $2,710.21, and upon the eighteenth day of January, 1898, defendant paid unto plaintiff the sum of $2,713.83, the first of said payments being made on account of interest upon the original cost of construction of said 3,362 lamp posts for the first six months of the year 1897; and the second of said payments being made on account of the interest upon said cost of

said lamp posts for the second six months of said year; but defendant has wholly refused to pay unto plaintiff the balance of the interest demanded by plaintiff as aforesaid.

Conclusions of Law.

As conclusions of law, I find:

First. That defendant is under obligation, by reason of the facts aforesaid, to pay unto plaintiff quarterly during the term for which said act of March 1, 1856, shall remain in force, to wit, to and including the thirty-first day of December, 1906, interest at the rate of eight (8) per cent. per annum upon the cost of said 3,362 lamp posts, as above determined.

Second. That plaintiff is entitled to judgment against said defendant for the sum of $1,419.12, with interest upon the sum of $711.37 from the first day of July, 1897, and upon the sum
65 of $707.75 from the first day of January, 1898, both at the rate of seven (7) per cent. per annum; that is to say, at this date, for the total sum of $1,604.51; and for its costs and disbursements in this action sustained or incurred.

Let judgment be entered accordingly.

GEORGE L. BUNN,
District Judge.

St. Paul, May 13, 1899.

EXHIBIT A.

This agreement, made and entered into this fourteenth day of March, A. D. 1896, by and between the St. Paul Gas Light Company, a corporation organized and doing business under and by virtue of an act of the legislature of the State of Minnesota, and having its principal place of business in the city of St. Paul, in said State, party of the first part, and said City of St. Paul, Minnesota, party of the second part, witnesseth:

Whereas, said City of St. Paul, party of the second part, desires its streets, alleys, lanes, landings, parks and other public places and public buildings of said city to be lighted with gas for a period of one (1) year from and after the first day of April, 1896, and said St. Paul Gas Light Company, party of the first part, is engaged in the business of supplying gas light to the residents of said city of St. Paul and its vicinity; and

66 Whereas, under and by virtue of the terms of section nine (9) of the act of the legislature of said State of Minnesota constituting the charter of said St. Paul Gas Light Company, party of the first part, said City of St. Paul, Minnesota, party of the second part, is under obligation to pay to said party of the first part interest upon the original cost of the street lamps, lamp posts, gas meters, gas pipes, and the cost of erecting and laying the same, at any time provided by said party of the first part for the service of said party of the second part at the request and order of said party of the second part, at the rate of eight (8) per cent. per annum, payable quarterly; and

Whereas, the proposal of the said St. Paul Gas Light Company, party of the first part, for lighting said city of St. Paul with gas, and for furnishing said city of St. Paul with gas for public buildings, according to certain specifications thereafter prepared by the board of public works of said city, which specifications are hereinafter mentioned and made a part hereof, having been accepted by the common council of said city of St. Paul:

Now, therefore, in consideration of the premises and of the mutual promises and agreements of the respective parties hereto, hereinafter set forth, it is hereby mutually covenanted and agreed as follows:

67 Article first.

1. Said party of the first part hereby covenants and agrees to furnish to said party of the second part a supply of merchantable illuminating gas, of not less than eighteen (18) candle power, full and sufficient to light at least three thousand and thirty-one (3,031) street lamps now in place in the streets, alleys, lanes, landings, parks and other public places within the territorial limits of said city of St. Paul, and to maintain and light the same, according to the specifications for gas lighting for said city of St. Paul heretofore prepared by said board of public works and now on file in the office of the city clerk of said city, a duly certified copy of which specifications is hereto attached and hereby referred to and made a part of this contract, and is marked "Exhibit A;" and also to furnish to said party of the second part a supply of such gas for use in all the public buildings using gas at the present time, or where gas may be ordered by the proper city authorities during the term of this contract.

2. Said party of the second part hereby covenants and agrees to pay to said party of the first part for each street lamp so to be lighted and maintained at the rate of twenty-three dollars ($23) per lamp per annum; and for all gas to be used in the public buildings of said city of St. Paul at the rate of one dollar and thirty cents ($1.30) per thousand cubic feet of gas so used; all of such
68 payments to be made monthly on estimates approved by said board of public works.

3. Said party of the first part further covenants and agrees to and with said party of the second part to erect and supply with light, upon the terms and conditions in this contract stated, all of the street lamps that may hereafter be ordered by said party of the second part to be placed upon any of the streets, alleys, lanes, landings, parks or other public places of said city during the continuance of this agreement; provided, however, that nothing in this agreement shall be construed to give any right or authority to said party of the second part to require said party of the first part to erect lamp posts or to light lamps on any street, alley, lane, landing, park or other public place at any point or points in said city at which the main pipes of the said party of the first part have not been laid.

Article second.

1. Said party of the second part hereby covenants and agrees to and with said party of the first part to receive and accept said supply of gaslight to be furnished and delivered by said party of the first part, according to said specifications, as above provided, and to pay for the same in monthly payments, as above provided, at the rate of twenty-three dollars ($23) per annum per lamp for
69 street lamps, and at the rate of one dollar and thirty cents ($1.30) per thousand cubic feet of gas so to be furnished for the public buildings of said city, party of the second part; and in case of default by said party of the second part in the monthly payments, as hereinabove provided, of any account due and rendered for a period of time exceeding thirty (30) days, then and in that case said party of the second part hereby agrees to pay interest upon the amount of any such account at the rate of seven (7) per cent. per annum from and after the date when said account should have been paid, as hereinabove provided; all of which shall be payable out of the funds raised by taxation to provide for the lighting of said city of St. Paul.

2. Said party of the second part hereby covenants and agrees to and with said party of the first part that the said common council of said city of St. Paul shall provide by ordinance for the protection of all said lamps and lamp posts, and the appurtenances thereof, against any damages or injury by careless or malicious persons, and shall, by such ordinance or ordinances, make it a penal offense for any person or persons to interfere, by lighting or extinguishing, or otherwise interfering with said street lamps, as aforesaid; and shall also require the police force of said city of St. Paul, as a special duty, to guard and care for said lamps and lamp posts embraced in this contract, and make it the duty of said police force to arrest
70 summarily any person or persons violating the ordinance or ordinances passed or to be passed by said second party, in accordance with the terms of this contract.

Article third.

1. It is expressly understood and agreed that this contract, and all the terms and provisions thereof, shall be and remain in force for the period of one (1) year from and after the first day of April, A. D. 1896; and that all the terms and conditions thereof shall be, and they are hereby in all things binding upon the parties hereto, their successors and assigns.

2. It is also expressly understood and agreed that none of the terms or provisions of this contract are to be construed to annul or modify in any way the obligation of said City of St. Paul to pay to said St. Paul Gas Light Company interest at the rate of eight (8) per cent. per annum, payable quarterly, upon the original cost of the street lamps, lamp posts, gas meters, gas pipes, and the cost of erecting and laying the same, at any time provided by said St. Paul Gas Light Company for the service of said city of St. Paul, at the request and order of said City of St. Paul, as provided by the terms

of section nine (9) of the act of the legislature of said State of Minnesota, constituting the charter of said St. Paul Gas Light Company, as aforesaid.

In witness whereof, said St. Paul Gas Light Company has caused its corporate seal to be hereto affixed and these presents to
71 be subscribed by its secretary the day and year first above mentioned. And said City of St. Paul, Minnesota, party of the second part, has caused the corporate seal of said city to be hereto affixed, and these presents to be subscribed by its mayor and clerk, and to be countersigned by the comptroller of said city, the day and year first above written, in duplicate.

ST. PAUL GAS LIGHT COMPANY,
By B. F. ELLISON, *Secretary.*
CITY OF ST. PAUL,
By ROBERT A. SMITH, *Mayor.*
MATT. JENSEN, *City Clerk.*

Countersigned:
J. J. McCARDY,
City Comptroller.

Signed, sealed and delivered in presence of—
A. W. REYNOLDS.

Judgment.

(Title of Action.)

Pursuant to the findings of fact and conclusions of law duly filed in the above-entitled action on the thirteenth day of May, A. D. 1899:

Now, on motion of Messrs. Squires & Cutcheon, attorneys for plaintiff, it is hereby adjudged that the plaintiff herein recover of said defendant City of St. Paul the sum of sixteen hundred,
72 seventeen and $\frac{60}{100}$ dollars, with twenty-one and $\frac{34}{100}$ dollars costs and disbursements, in all amounting to $1,638.95.

Signed this twenty-fourth day of June, A. D. 1899.

EDWARD G. ROGERS, *Clerk.*

Notice of Appeal.

(Title of Action.)

To Messrs. Squires & Cutcheon, attorneys for the above-named plaintiff, and to E. G. Rogers, clerk of said district court:

You will please take notice, that the above-named defendant appeals to the supreme court of the State of Minnesota from the judgment of the said district court entered herein, on the 24th day of June, A. D. 1899, in favor of the plaintiff and against the defendant for the sum of $1,638.95 damages and costs and from the whole thereof.

Dated this 28th day of June, A. D. 1899.

JAMES E. MARKHAM,
Attorney for Defendant.

73 STATE OF MINNESOTA:

Supreme Court.

ST. PAUL GAS LIGHT COMPANY, Plaintiff,
vs.
CITY OF ST. PAUL, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that any and all acts and parts of acts of the legislature of either the Territory of Minnesota or of the State of Minnesota that may be regarded by either party to said action as material to the subject of controversy may be read by such party upon any hearing herein in either the supreme court of Minnesota or in the Supreme Court of the United States, and that said acts, when so read, shall have the same force and effect as if the same were set forth at length in a settled case containing all the evidence introduced upon the trial of said action.

St. Paul, July 31st, A. D. 1899.

SQUIRES & CUTCHEON,
Attorneys for Plaintiff.
JAMES E. MARKHAM,
Attorneys for Defendant.

74 Endorsed: 11741. Filed Nov. 27, 1899. D. F. Reese, clerk.

75 11741.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

ST. PAUL GAS LIGHT CO., Respondent,
vs.
THE CITY OF ST. PAUL, Appellant.
No. 119. Syllabus.

Held, under the charter of the St. Paul Gas Light Co. (ch. 53, L. 1856), the City of St. Paul is not compelled to pay the gas light Co. compensation for street gas lamps which the city is not using to light its streets and is not by any contract required to continue to use.

Judgment reversed and a new trial granted.

76 11741.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

ST. PAUL GAS LIGHT CO., Respondent,
vs.
THE CITY OF ST. PAUL, Appellant. } No. 119. Opinion.

The question involved in this case is whether the St. Paul Gas Light *Light* Co. is entitled to compensation for street gas lamps, lamp posts, connecting pipes, and gas meters remaining in the streets of St. Paul, which the city ordered the gas light Co. to erect, and which on being so erected the city used for a time, but is not now using.

The charter of the gas light Co. provides that it shall furnish and lay these and keep them in repair at its own expense, and that the city shall pay to the gas Co. as compensation therefor "an interest at 8 per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same." There is no express provision as to how long the city shall pay such compensation, or whether it shall pay the same after it has ceased to use the street lamps, and the question must be decided by the interpretation of several provisions of the charter.

The gas light Co. was incorporated by ch. 53, Laws of 1856. The act took effect January 1, 1857, and provides that at the end of twenty years the city shall have the privilege of buying the gas plant; but if the city shall at that time decline to do so, it may exercise a like option at the end of twenty years more; "but should the city
77 not resolve to purchase at either of the times provided herein, then this act shall be in full force for an additional term of ten years from and after the last date mentioned (January 1, 1897) for such sale and purchase, and no longer."

The city did not exercise its option at the end of either 20-year period, and so the charter of the gas light Co. will continue to January 1, 1907, a period of 50 years.

The charter contains the following provisions:

"SEC. 9. That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: Provided, that whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes, and meters, all to be of the best quality of

work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing the same."

"SEC. 14. The corporation of the city of St. Paul and the
78 board of directors of the St. Paul Gas Light Company may contract for and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon, and they may make generally such contracts in relation to the business of the company as may be beneficial to them and the public."

These are all of the provisions of the charter which we deem it necessary to consider. It will be observed that the clause first above quoted is found in sec. 9.

The charter provides no way in which the city can procure gas to light its streets except that provided by sec. 14, under which the city must make a contract voluntarily entered into by both parties in order to procure gas for that purpose. The city and the gas Co. have made such contracts from time to time, some of the contracts covering a period of five years each and others a period of only one year each.

Many things might have occurred which would make it proper that the city should abandon the use of gas for street-lighting purposes in the whole or a particular part of the city. For instance, a suburb of the city within the corporate limits might have been supported by some large factory or other industry which was discontinued, and that part of the city might for that reason have gone to decay and its population become so reduced as to render it proper and expedient to cease lighting its streets, or such suburb might have been destroyed by fire and never have been rebuilt. Again, it might have become necessary to substitute electricity for gas in lighting the city or a part of it.

It seems to us that it would be unreasonable to hold that if at the inception of the 50 years which this charter was to run the city had ordered such street lamps to be erected, had used them 10 years under a contract for lighting the streets which expired at the end of
that time, and then, on account of some such contingency,
79 had ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, connecting pipes, and meters for 40 years more and to permit them to encumber the streets for that length of time, although the city had not a particle of use for such street lamps during all of that time. Again, it would be unreasonable to hold that the city council might, under sec. 9, compel the gas Co. to erect street lamps, and then, after using them a month or a year, abandon the use of gas for street-lighting purposes, and thereby avoid all liability to pay any other compensation for the erection and use of the street lamps than 8

per cent. per annum during such use on the cost of erecting the same.

But we are of the opinion that sec. 9 does not give the council the right in its discretion to compel the erection of street lamps regardless of how long the city may use them and without protecting the gas Co. by stipulating a length of time during which the city shall use them.

Sec. 9 provides that whenever the city "by resolution of its board of aldermen directs lamps to be erected and lighted in the streets of the city" the gas Co. shall erect the same and keep them in repair; but, as we have seen, the city has no power under the charter to compel the streets to be lighted except by making for that purpose a contract voluntary as to both parties. When making such a contract the gas Co. can refuse to contract for lighting any street lamps except those already erected, and before the city can compel the erection of more lamps it must first make a contract for lighting them. In making such a contract, the gas Co. can protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the 8 per cent. per annum to be paid during that time will remunerate the gas Co. for
80 erecting the lamps. We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to use.

This, in our opinion, is the more reasonable and proper construction of the provision of the charter and the one which should be adopted. We therefore hold that the city is not liable for such compensation for street lamps after it has ceased the use of the same and abandoned the use of gas in lighting its streets.

The claims of respondent that there has been by both parties a practical construction of the charter which binds the city to pay such compensation for street lamps which it is using is untenable.

Neither can we hold that any of the contracts made between the parties under sec. 14 binds the city to pay such compensation for street lamps not in use.

The judgment is reversed and a new trial granted.

CANTY, *J.*

81 11741.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

ST. PAUL GAS LIGHT CO., Respondent,
vs.
THE CITY OF ST. PAUL, Appellant. } No. 119. Order.

Upon the stipulation of the parties hereto in open court, it is ordered that the order heretofore made herein be, and it is hereby, modified so as to read as follows: "Ordered that the judgment appealed from be reversed, and that final judgment be entered in this

court for the defendant, but without prejudice to the plaintiff's right to apply to the court for a reargument."

Dated November 27th, 1899.

82 [Endorsed:] No. 11741. State of Minnesota, supreme court. St. Paul Gas Light Co., respondent, *vs.* The City of St. Paul, appellant. Copy. Opinion and syllabus. Original filed November 14, 1899. D. F. Reese, clerk. October term, A. D. 1899. Canty, J.

83 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

ST. PAUL GAS LIGHT COMPANY, Respondent,
vs.
CITY OF ST. PAUL, Appellant. } No. 119.

Pursuant to an order of court, duly made and entered in this cause on the twelfth day of December, A. D. 1899—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is, in all things reversed; and it is hereby further adjudged that The St. Paul Gas Light Company, the plaintiff and respondent herein, take nothing by its action against The City of St. Paul, the defendant and appellant herein, and that said defendant go hence without day; and it is further determined and adjudged that the appellant above named do have and recover of said St. Paul Gas Light Company, respondent herein, the sum and amount of fifty-nine and $\frac{58}{100}$ dollars ($59.58), costs and disbursements in this cause in this court, and that said appellant have execution for the enforcement thereof.

Dated and signed this 12th day of December, 1899.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	21.08
Clerk's fees, supreme court	13.50
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$59.58

84 [Endorsed:] 11741. State of Minnesota, supreme court. Transcript of judgment. Filed Dec. 12, A. D. 1899. D. F Reese, clerk. —— ——, attorney for ——. Page No. 152, X Book

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this twelfth day of December, A. D. 1899.

D. F. REESE, *Clerk.*

85 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

ST. PAUL GAS LIGHT COMPANY, Respondent, *vs.* CITY OF ST. PAUL, Appellant. } No. 119. Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1899, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things reversed and final judgment ordered for defendant, and that the appellant above named have judgment accordingly.

Entered December 12th, A. D. 1899.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

86 [Endorsed:] No. 11741. State of Minnesota, supreme court. Copy of order for judgment. Filed Dec. 12, A. D. 1899. D. F. Reese, clerk. Entered on page 37 "N."

87 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1899, Thursday Morning, 9.30 o'clock.

OCTOBER 26TH, A. D. 1899.

Court convened pursuant to adjournment, all the justices being present.

ST. PAUL GAS LIGHT COMPANY, Respondent, *vs.* CITY OF ST. PAUL, Appellant. } Cal. No., 119; Reg. No., 11741.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

88 [Endorsed:] 11741. State of Minnesota, supreme court. Copy of minutes of argument. Filed Dec. 12, A. D. 1899. D. F. Reese, clerk.

89 [Endorsed:] No. 11741. State of Minnesota, supreme court. St. Paul Gas Light Co., respondent, against City of St. Paul, appellant. Judgment-roll. Filed December 12, 1899. D. F. Reese, clerk.

90 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, *Office of Clerk of Supreme Court,* } ss:

I, Darius F. Reese, clerk of the supreme court, State of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record and all proceedings, with all things concerning the same, had in the said supreme court of the State of Minnesota in the case between The St. Paul Gas Light Company, respondent, and The City of St. Paul, appellant, including stipulation of the parties and the opinion of the said supreme court therein, as appears from the original files and records.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are, copies of the petition for writ of error, with allowance of same, and of the

assignments of error and of the bond as the same rem ain on fil and of record in said supreme court of the State of Minnesota, and are the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with proof of service thereof, and that the foregoing constitutes a true, full, and complete return to said writ of error.

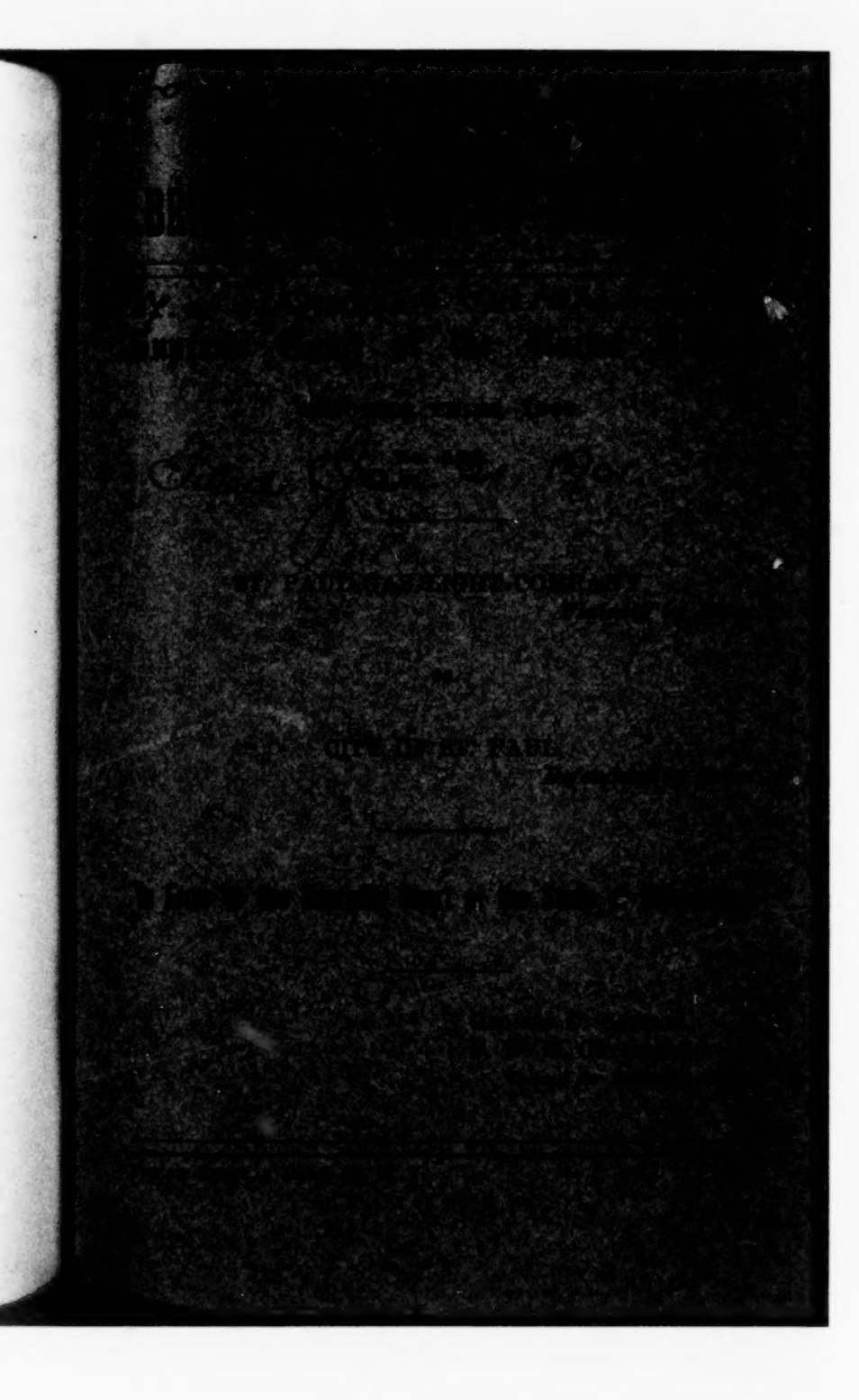
In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota, at the capitol, at St. Paul, Minnesota, this 4th day of January, A. D. 1900.

Seal of the Supreme Court, State of Minnesota.

D. F. REESE,
Clerk of the Supreme Court Minnesota.

[Endorsed:] State of Minnesota, supreme court.

Endorsed on cover: File No., 17,606. Minnesota supreme court. Term No., 183. The St. Paul Gas Light Company, plaintiff in error, *vs.* The City of St. Paul. Filed January 15th, 1900.



Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 183.

ST. PAUL GAS LIGHT COMPANY,
Plaintiff-in-Error,

vs.

CITY OF ST. PAUL,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of Facts.

The plaintiff-in error was incorporated as a gas company by special act of the Territorial Legislature of Minnesota in 1856 (*S. L. Minnesota, 1856, Chapter 53. For copy see Appendix A hereto*). It has performed all the conditions prescribed by its charter and has invested in its property and business very large sums of money in reliance upon the provisions of that instrument. For more than forty years it has been engaged in producing gas and supplying the same to the City of St. Paul and its inhabitants, and for more than fifteen years has also produced and supplied electric light, electric power and steam heat (*Findings of Fact, Printed Record, folios 56 and 57*).

Among other provisions its charter includes the following:

"That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the Board of Directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gasworks into successful operation as soon as practicable: PROVIDED, That whenever the corporation of the City of St. Paul shall, by resolution of the Board of Aldermen, direct lamps to be erected and lighted in the streets of the City, the company shall make contract therefor and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the City shall pay quarterly to the St. Paul Gas Light Company, an interest of eight per cent. *per annum* on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing the same" (*Appendix A, Section 9*).

"That if after the expiration of twenty years from and after the first day of January, 1857, the corporation of the City of St. Paul should resolve to purchase the said gas works from the St. Paul Gas Light Company, which they hereby have a right to do, the price shall be fixed by arbitrators, * * * " (*Appendix A, Section 10*).

"That in the event the said City shall decline to purchase at the end of twenty years, as provided in the preceding section, then the Company shall, in like manner, at the end of twenty years from and after the first day of January, A. D. 1877, and provided the Board of Aldermen then resolve to purchase the same, sell and convey the City all their estates, interest and titles, to the said gas works in manner as is before provided in Section Ten * * *" (*Appendix A, Section 11*).

"The corporation of the City of St. Paul and the Board of Directors of the St. Paul Gas Light Company may contract for and make regulations relating to the lighting of said City with gas, in such manner as may be agreed upon, and they may make generally such contracts in relation to the business of the Company as may be beneficial to them and the public" (*Appendix A, Section 14*).

"This act shall be in force for the term of twenty-five years from and after the first day of January, in the year of our Lord one thousand eight hundred and fifty seven, unless the Company hereby incorporated shall sell and convey within the said term of twenty years, their gas works, lands, rights and privileges, as herein provided, to the City of St. Paul * * * ; but should the said City not resolve to purchase at either of the times provided herein, then this act shall be in full force for an additional term of ten years from and after the last date mentioned for such sale and purchase, and no longer * * *" (*Appendix A, Section 15*).

"This act shall be in force from and after its passage, and shall be deemed a public act, and be favorably construed for the purposes herein expressed and declared in all Courts and places" (*Appendix A, Section 16*).

[The City permitted both January 1, 1877, and January 1, 1897, to pass without attempting to exercise its right to purchase the property and interests of the Gas Company, and the latter's charter-act will admittedly remain in force until January 1, 1907.]

Exercising the power conferred by Section 9 of the Gas Company's charter, the City, at various times prior to January 1, 1897, by resolutions of its Board of Aldermen or Common Council, directed street-lamps to be erected and lighted by the Company to the aggregate number of 3,362 and in every case the Company obeyed the orders so given in the manner prescribed in its charter (*Findings of Fact, Printed Record, fol. 59*).

From the time of the erection of each of these 3,362 lamps until March, 1896, the Gas Company supplied it with gas under various express contracts with the City (*Findings of Fact, Printed Record, fol. 59*).

To the contract for street lighting entered into in March, 1896, certain specifications were attached, which contained a provision fixing the maximum number of lamps to be lighted during the ensuing year at 3,031 and reserving to the City the right to terminate the contract, as to any given lamp or lamps, by written notice to that effect (*Findings of Fact, Printed Record, fol. 60*).

The contract itself contained the following recital:

"Whereas, under and by virtue of the terms of section nine (9) of the Act of the Legislature of said State of Minnesota constituting the charter of said St. Paul Gas Light Company, party of the first part, said City ot St. Paul, Minnesota, party of the second part, *is under obligation* to pay to said party of the first part interest upon the original cost of the street lamps, lamp posts, gas meters, gas pipes, and the cost of erecting and laying the same, *at any time* provided by said party of the first part for the service of said party of the second part at the request and order of said party of the second part, at the rate of eight (8) per cent. per annum, payable quarterly." (*Findings of Fact, Printed Record, fol. 66*).

The contract also contained the following provision:

"It is also expressly understood and agreed that none of the terms or provisions of this contract are to be construed to annul or modify in any way the obligation of said City of St. Paul to pay to said St. Paul Gas Light Company interest at the rate of eight (8) per cent. per annum, payable quarterly upon the original cost of the street lamps, lamp posts, gas meters, gas pipes and the cost of erecting and laying the same, *at any time* provided by said St. Paul Gas Light Company for the service of said City of St. Paul, at the request and order of said City of St. Paul, as provided by the terms of section nine (9) of the act of the Legislature of said State of Minnesota, constituting the charter of said St. Paul Gas Light Company, as aforesaid" (*Findings of Fact, Printed Record, fol. 70*).

And it should be stated, in passing, that each of the contracts of 1886, 1890 and 1891, respectively, had contained a recital of the obligation of the City, under Section 9 of the Company's charter, to pay interest, identical with that quoted from the contract of 1896 (*Findings of Fact, Printed Record, fols. 62 and 63*).

During the early part of the contract year 1896–7, the Company lighted 3,031 lamps (331 remaining idle), but, having been directed by the City to discontinue certain lamps, during the remainder of the year including some portion of 1896 and all of 1897, up to May 1st, lighted only 2,690 thereof (672 remaining idle), (*Findings of Fact, Printed Record, fols. 60, 61 and 62*).

In March, 1897, the Gas Company and the City entered into another contract for street lighting. The specifications attached

to this contract were, in the particulars above noticed, identical with those attached to the contract of 1896. The contract, proper, differed from that of 1896, in this, that, instead of the clauses above quoted from the contract of 1896, it contained simply a stipulation that none of its terms should be taken to prejudice the claims of either party as to the City's obligation, if any, to pay interest under Section 9 of the Company's charter (*Findings of Fact, Printed Record, fol 61*).

During the remainder of the year 1897, the Company, having been directed by the City to light but 2,690 lamps, lighted only that number. The lamps that were out of service, however, were at all times maintained ready to be put into service again upon the City's order (*Findings of Fact, Printed Record, fols. 61 and 62*).

The cost of the Gas Company of the 3,362 lamps above mentioned was $85,539.53, all of which it had paid out prior to January 1, 1897. The cost of it, of the 672 lamps that were not in service during the year 1897, was $17,830.75 (*Findings of Fact, Printed Record, fol. 62*).

The City paid the Gas Company interest at the rate of eight (8) per cent. per annum upon the cost of each of the 3,362 lamps mentioned, for the whole period elapsing between the erection of such lamp and post and January 1, 1897 (*Findings of Fact, Printed Record, fol. 62*).

On July 1, 1897, or shortly thereafter, the Company demanded payment of interest for six months upon the whole cost of the 3,362 lamps (*Findings of Fact, Printed Record, fol. 63*). Before any action upon this demand was taken, the Common Council of the City adopted and the Mayor approved (on August 20, 1897) a resolution reading as follows:

"Resolved, that the St. Paul Gas Light Company be, and it is hereby required forthwith to remove the gas street lamp posts in that portion of the City now lighted with electric light under contract with said Company, and which said lamps have been discontinued by order of the Board of Public Works.

"Resolved, further, that the Board of Public Works is hereby required to transmit to the City Comptroller a statement showing the number and location of said gas street lamp posts not now in service in said electric light district above referred to,

and that from and after the passage of this resolution no interest be paid by the City of St. Paul to said St. Paul Gas Light Company on account of the cost and the purchase and equipment of said gas street lamp posts" (*Complaint, Printed Record, fols. 40 and 41; Answer, fol. 47; Findings of Fact, fol. 63*).

[The effect of this resolution will be discussed in another portion of this argument. The various provisions of the city charter affecting the power of the Common Council to pass it and its effect after passage will be found collected in "*Appendix* B" hereto.]

The list required by this resolution was prepared by the Board of Public Works and was by it transmitted to the City Comptroller, who thereafter approved the Gas Company's claim for interest accrued during the first half of the year only to the extent of the amount due upon the cost of the lamps then remaining in service. (Although this fact does not *expressly* appear by the present record, it did appear in evidence upon the trial and does now appear by implication, and it will be admitted to be true.) The amount thus allowed the Council ordered paid, and it was paid on October 20, 1897. The Company's claim for interest for the last half of the year 1897 was likewise approved and allowed only to the same extent, the amount allowed being paid January 18, 1898. The City has wholly failed to make any other payment on account of this interest for the year 1897 (*Findings of Fact, Printed Record, fols. 63 and 64*).

Proceedings in this Action.

This action was brought by the Gas Company against the City to recover the amount of the unpaid balance of interest upon the cost of the 3,362 lamps mentioned, that accrued during the year 1897.

The Complaint was drawn upon the supposition and arrangement that the City would demur thereto, and therefore contains many allegations that would ordinarily have been left to be set up by answer. Among other things, it set up the resolution of August 20, 1897, above quoted, and expressly asserted that the same and all laws of the State authorizing its

passage are void as being in direct contravention of Section 10, Article I of the Constitution of the United States, and of Section 1 of Article XIV of the Amendments thereto (*Complaint, Printed Record, fol. 42*).

The Answer filed on behalf of the City admitted the incorporation of the parties, the nature and extent of the Gas Company's business, its large investments therein and the enactment and language of its charter-act (*Answer, Printed Record, fol. 44*), the various orders given to the Company by the City for the erection of the 3,362 street-lamps mentioned, and the Company's obedience thereto (*Answer, Printed Record, fols. 44 and 45*), the facts set out in the complaint with reference to the length of time during which the lamps had remained in service, respectively (*Answer, Printed Record, fols. 45, 46 and 52*), the passage of the resolution of August 20, 1897 (*Answer, Printed Record, fol. 47*), the demands upon the City for payment of interest accrued during the year 1897, and that the payments made were only those alleged in the complaint (*Answer, Printed Record, fol. 47*). It put the Company to its proof of the performance of the stipulations prescribed by the latter's charter as conditions precedent to its enjoyment of the rights thereby conferred (*Answer, Printed Record, fol. 44*), and of the cost of the lamps and of their erection and equipment (*Answer, Printed Record, fol. 47*). It denied that at any time whatever, there had become due from the City to the Company as interest upon the cost of the lamps mentioned the sums stated in the complaint, or any sum (*Answer, Printed Record, fol. 47*). It then set up as a defense a provision contained both in the street lighting contract made by the City and the Company on March 14, 1896, and in that made May 1, 1897, whereby it was stipulated that after service by the City upon the Company of notice to discontinue lighting any lamp or lamps covered by the contract, the Company should not be entitled to any further compensation *for the lighting* of the lamp or lamps so ordered discontinued, and the fact that the lamps upon the cost of which interest had not been paid had been discontinued by virtue of this provision. It also contained allegations that these contracts included no agreement for the payment of in-

terest and that the City had performed them upon its part (*Answer, Printed Record, fols. 47-52*).

The action was tried before one of the Judges of the District Court of Ramsey County, Minnesota, who ordered judgment in the Company's favor for the full amount claimed (*Printed Record, fol. 64*). Judgment was so entered (*Judgment, Printed Record fols. 71 and 72*). The City took an appeal to the Supreme Court of the State. In that Court the discussion centered upon the question of the proper construction of Section 9 of the Gas Company's charter. The Court, by its judgment, reversed the judgment of the District Court, adjudged that the Company take nothing by its action against the City, and gave judgment in favor of the City and against the Company for $59.58, costs (*Judgment, Printed Record, fol. 83*).

THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA is founded upon the following conclusions, in which are embodied the entire substance of the Court's opinion. (*Printed Record, folios 75 to 80*):

(1) It is unreasonable that the City should be obliged to pay interest for a long period upon the amount of the cost of street lamps that during the major portion of such period have been unnecessary and consequently disused; and such a result might flow from the construction of the provision in question contended for by the Company.

(2) It is equally unreasonable that the City should be under obligations to pay interest upon the cost of street lamps erected by its direction only for such time as it may arbitrarily permit service by means of such lamps to be contained.

(3) In view of the omission from the act of any provision of a special means by which the City can compel the Company to light street lamps in the absence of voluntary contract and of the insertion of special authority to enter into such contracts, it must be held that the City cannot enforce, and therefore within the intent of the law cannot give, an order to light lamps until it has entered into a contract for their lighting; and as the Company's obligation to erect the lamps arises only upon a direction by the City to "erect *and light*" them, that obli-

gation cannot arise until a contract for lighting satisfactory to the Company has been made.

(4) As by means of such a contract the Company may secure indemnification against loss by reason of its investment in the lamps and their equipment, it is reasonable to hold (and the Court does hold) that the City's obligation to pay interest upon the amount of the cost of a street lamp and its equipment continues only for the period during which the lamp remains in service.

A petition for a rehearing, filed on behalf of the Company having been denied, a writ of error was sued out to bring the case to this Court for review.

Assignments of Error.

The following are the assignments of error filed in this Court by the plaintiff in error, all of which are insisted upon:

"I. The Supreme Court of Minnesota erred in its decision of said suit in holding that the contract between the plaintiff in error and the defendant in error embodied in Section 9 of Chapter 53, Special Laws of Minnesota, 1856, being an Act of the Legislature of the Territory of Minnesota, entitled 'An Act to incorporate the St. Paul Gas Light Company,' approved March 1st, 1856, and formed by the passage and acceptance of the said Act, did not, in consequence of the adoption of the resolutions of the Board of Aldermen and Common Council of defendant in error directing plaintiff in error to erect and light lamps in the streets of said city, defendant in error, and the acts of plaintiff in error performed in obedience to said resolutions, obligate the defendant in error to pay the plaintiff in error an interest of eight per cent. per annum upon the amount of the sum of the original cost of the lamps, lamp-posts, pipes and meters erected and furnished by plaintiff in error in obedience to said resolutions except for periods during which said lamps were actually in the service of defendant in error under contract for lighting the same between plaintiff in error and defendant in error.

II. The Supreme Court of Minnesota erred in its decision of said suit in holding that the said contract between the plaintiff in error and the defendant in error embodied in said Section 9 of Chapter 53, Special Laws of Minnesota, 1856, and formed as aforesaid, did not obligate the defendant in error to pay to plaintiff in error an interest of eight per cent. per annum upon the amount of the cost of every lamp, lamp-post, pipe, and meter erected in obedience to the order of defendant in error given, as hereinabove stated, for the whole period elapsing between the date of the erection and furnishing of such lamp, post, pipe or meter, and the date for the expiration of the term of the charter act of plaintiff

in error, to wit, said Chapter 53 of the Special Laws of Minnesota, 1856.

III. The Supreme Court of Minnesota erred in its decision of said suit in holding that the resolution of the Common Council of said defendant in error approved August 20th, 1897, and set forth in full in the complaint herein, which read as follows:

'Resolved, That the St. Paul Gas Light Company be, and it is hereby, required forthwith to remove the gas street lamp-posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the Board of Public works.

'Resolved further, That the Board of Public Works is hereby required to transmit to the City Comptroller a statement showing the number and location of said gas street lamp-posts not now in service in said electric light district above referred to, and that from and after the passage of this resolution no interest be paid by the City of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp-post,' is not a law of said State of Minnesota within the meaning of Section 10, Article 1, of the Constitution of the United States.

IV. The Supreme Court of Minnesota erred in its decision of said suit in holding that said resolution of the Common Council of defendant in error approved August 20th, 1897, does not impair the obligation of the said contract between plaintiff in error and defendant in error embodied in said Section 9 of said Chapter 53 of the Special Laws of Minnesota, 1856, and formed as hereinabove set forth, and that said resolution is not in conflict with the provisions of Section 10, Article 1, of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts.

V. The Supreme Court of Minnesota erred in its decision of said suit in holding that said resolution of the Common Council of the defendant in error approved August 20th, 1897, and the acts of the legislature of the

State of Minnesota empowering said common council to pass the same do not impair the obligation of the said contract between plaintiff in error and defendant in error embodied in said Section 9 of said Chapter 53 of the Special Laws of Minnesota, 1856, and formed as hereinabove set forth, and that said resolution and each and all acts of the legislature of said State of Minnesota empowering said council to pass the same are not in conflict with the provisions of Section 10, Article 1, of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts.

VI. The Supreme Court of Minnesota erred in its decision of said suit in holding that the said resolution of the Common Council of defendant in error approved August 20th, 1897, and the acts and doings of defendant in error thereunder did not deprive plaintiff in error of property, to wit, of the rights vested in it under said contract embodied in said Section 9 of said Chapter 53 of the Special Laws of Minnesota, 1856, and formed as hereinabove set forth, without due process of law, and that said resolution and the acts and doings of defendant in error thereunder are not in conflict with the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which declares that no state shall deprive any person of property without due process of law.

VII. The Supreme Court of Minnesota erred in its decision of said suit and in its final judgment entered therein, in this, that it gave effect to said resolution of the common council of said defendant-in-error, approved August 20th, 1897, and the acts and doings of said defendant-in-error thereunder, which said resolution was in direct and necessary violation of said Section 10 of Article 1 of the Constition of the United States, and which said resolution and the acts and doings of defendant thereunder, were in direct and necessary violation of said Section 1 of Article XIV of the Amendments to the Constitution of the United States.

VIII. The Supreme Court of Minnesota erred in its de-

cision of said suit in directing that the judgment of the District Court of Ramsey County, Minnesota, theretofore entered in said suit be reversed, and directing that judgment be entered in said suit against said plaintiff-in-error, and in favor of said defendant-in-error.

IX. The Supreme Court of Minnesota erred in this, that by the record aforesaid it appears that the judgment given by it, as aforesaid, was given for said defendant-in-error and against said plaintiff-in-error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in-error against said defendant-in-error."

Argument.

Counsel for the defendant in error has informed me that upon the hearing he will challenge the jurisdiction of this court to review the judgment of the Supreme Court of Minnesota. Therefore, before proceeding to consider the ultimate point in the case—the construction of Section 9 of the Gas Company's charter—I will, as best I can without knowledge of the specific objections that he intends to urge, discuss the question of jurisdiction.

This court possesses jurisdiction to review the judgment of the Supreme Court of Minnesota.

Section 709 of the United States Revised Statutes provides that this Court shall have jurisdiction, upon writ of error to the highest Court of a State, to review "a final judgment or decree in any suit * * * in which is drawn in question * * * the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution * * * of the United States, and the decision is in favor of their validity."

Given, then, an action in which a party claims that some instrument constitutes, or some transaction raises, a contract entitling him to the rights that he asserts and that some subsequent law of the State is void because impairing the obligation of such contract, and a decision of the highest Court of a State whereby the law thus drawn in question is held to be valid, and, if there be color for the claims so made, and if the decision of the state court is not also founded upon some doctrine of local law sufficient in itself to sustain the judgment rendered, it will be conceded that a case exists over which this court has jurisdiction.

The questions, whether there is a contract as claimed, and, if so, what its interpretation should be and whether the law assailed does impair the contract obligation, are all proper to a consideration of the case upon its merits.

It must be admitted that in this case the State Court had before it an instrument (Section 9 of the Gas Company's charter) that was claimed by the plaintiff in error to embody a con-

tract under which it was entitled to recover the amount sued for; that there was color for this claim; that the Resolution of August 20, 1897, was passed subsequently to the formation of the contract claimed; that the Company attacked the validity of this resolution upon the ground that it impaired the obligation of the Company's contract; that there was color for this attack; and that the decision of the Supreme Court of Minnesota, made in the face of these claims, was founded solely upon certain conclusions as to the proper interpretation of the contract, and, therefore, not upon any doctrine of local law sufficient in itself to sustain the judgment. There are, then, so far as I can conjecture, but two objections to the jurisdiction that can be suggested:

(1) That the Resolution of August 20, 1897, is not a law of the State of Minnesota;

(2) That the decision of the Supreme Court of Minnesota was not in favor of the validity of the resolution.

I.

It is, of course, too late for the contention that a municipal ordinance or resolution may not be a law of a state within the meaning of the Constitution to be seriously urged. The reports of this Court contain many decisions to the contrary effect.

For examples, see

Murray v. Charleston, 96 U. S., 432.
Wright v. Nagel, 101 U. S., 791.
Hamilton Gas Light Co. v. Hamilton City, 146 U. S., 258.
Walla Walla City v. Walla Walla Water Co., 172 U. S., 1.

See also

N. O. Water Works v. La. Sugar Co., 125 U. S., 18, p. 31.
Bacon vs. Texas, 163 U. S., 207, p. 216.

This resolution was not only in the form of a law, but was by

the charter of the City expressly invested with the full force of and declared to be a law of the State (*See Appendix B, Sec. 40*).

Its operation was that of a law. It contains directions and inhibitions addressed by the City Council (the local Legislature) to the administrative officers of the City—directions and inhibitions that actually have been observed by,and, had not the resolution been unconstitutional, would have been binding upon all such officers.

It was a law in its very essence. It will not be contended that a legislative enactment, made in the course of the discharge of sovereign or governmental functions, is not a law. And it will be admitted that the care and control of the finances of a great municipality, the provision and maintenance of a proper system of lighting its streets, and the regulation of their use are functions of government resting primarily in the State. (*See Walla Walla v. Walla Walla Water Co., 172 U. S., 1, pp. 7-11.*) The St. Paul City Council, in 1897, by delegation from the State, possessed the power and was charged with the duty to levy taxes and collect license-fees and to care for and disburse the revenues so derived, that is to say, it had entire charge of all the revenue and financial affairs of the City. (*Appendix B, Secs. 57, 40 and 56.*) It possessed the power and was charged with the duty to provide and maintain a proper system of street-lighting within the city boundaries, (*Appendix B, Sec. 40, Subd. 11.*) It likewise possessed the power and was charged with the duty to regulate the use of the streets of the City, to prevent the encumbering or obstruction of the same and to abate nuisances therein. (*Appendix B, Sec., 40, Subds. 6 and 31, and Sec. 44.*) In the exercise of these powers and the discharge of these functions, therefore, the City Council represented the state, exercised its power and performed its governmental functions. The resolution in question was adopted in the exercise of these powers, in the attempt to discharge these functions. It was not an act performed in the exercise of the City's proprietary rights or in the administration of its corporate property. It was not a mere act of dealing with the Gas Company. Counsel for the City will probably answer that, despite all this, the resolution was a mere refusal by the City to pay interest, in no way different from a refusal

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by an individual to pay his debts, and that for the purpose of the question in hand it should be considered as if it were the declaration of a natural person. But this contention ignores the essential difference between a natural person and a governmental body, as well as the difference in identity between the City Council and the City itself. The decrees of the individual bind no one. The decrees of the City Council, made within the scope of its authority, control its officials, and, if valid, are also binding upon the inhabitants of the City and the courts. Again, a legislative act of the City Council is not the act of the City, except in the sense that the City is bound and suffers or profits by it. The Council and the City are not identical either in fact or in law. The first is a body of men constituting the local Legislature and invested in part with the Legislative power of the State. The other is a fictitious entity composed of certain territory and its inhabitants and having a certain political organization. As a corporation a city ordinarily possesses no legislative power. It is not essential to the idea of a city even that any one of its officers or boards shall possess such power. In the case of the City of St. Paul, one of its boards (the Common Council) does exercise legislative power, but this it does by direct delegation from the State Legislature, not as the agent of the City. Its resolution, therefore, was not a mere refusal by the City to pay its debt. It was a decree of the State addressed to the City. It was in quality exactly the same thing that an act of the State Legislature prohibiting the payment of the same charge would have been.

A single fact connected with the operation of the Resolution very clearly illustrates its character as a law. The charter of St. Paul prohibits the Council to allow any claim against the City until it has been audited and adjusted by the City Comptroller (*Appendix B, Sec. 28*). This resolution, however, if not constitutionally invalid, was binding upon the Comptroller (*Appendix B, Secs. 36 and 40*). As a consequence, it not only operates to prevent the adjustment and audit of any future claim for interest upon the cost of the lamps referred to in it, but absolutely prevented any such claim ever again comingbefore the Council for consideration. And suppose that the Gas Company

had sought by mandamus to compel the City Comptroller to audit and adjust its unpaid claim for interest. This resolution, if no limitation upon the power of the State to impair the obligation of contract had existed, would have afforded the Comptroller a complete defense.

Moreover, this resolution is something more, even, than an exercise of the powers to control the matters of city finance and street lighting and to regulate the use of public highways. It is primarily and essentially an attempt by the State through the City Council (to which the discharge of the obligation arising under the Gas Company's charter had in large part been entrusted) to define this obligation, that is to say, to define the terms or limit the operation of a prior law. It is impossible to understand how a government can by legislative act define the terms or limit the operation of one of its existing laws except through the medium of a law.

Certainly this resolution falls much more clearly within the ordinary conception of what a law is than does a resolution providing for the erection of a municipal water works, such as was the subject of discussion in *Walla Walla v. Walla Walla Water Company* (*supra*), or an ordinance providing for the erection of a gas plant, such as was under consideration in *Hamilton Gas Light Company v. Hamilton* (*supra*). And yet, as was said by Mr. Justice Brown in the Walla Walla Case (*172 U. S., 1, pp. 7, 8, 10*):

"The argument of the defendant in this connection is that the action of the City in contracting with the Water Company, and in passing the ordinance of 1893 providing for the erection of water works, was not in the exercise of its sovereignty; that in these particulars the City was not acting as the agent of the State, but was merely exercising a power as agents of its citizens, and representing solely their proprietary interests; * * * and, therefore, that neither the State nor the City as its agent can be charged either with the making or the impairing of the original contract; * * *."

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and Laws of the United States."

If this resolution is not a law, then the amendment to the

Minnesota Constitution that prohibited the payment of the principal of or interest upon the bonds of the State issued in aid of railroads unless the same should first be approved by a majority of the electors of the State, was not a law (*see State v. Young, 29 Minn., 526*); nor was the ordinance of the City of Charleston that required the tax upon the city stock to be deducted from the interest due thereon (*Murray v. Charleston, 96 U. S., 432*); nor was the similar statute of Virginia that required the tax on the refunding bonds of that state to be deducted from the amounts payable upon coupons cut from those bonds (*Hartman v. Greenhow, 102 U. S., 672*); nor was the statute of Louisiana that scaled down the interest upon the refunding bonds of that State (*Louisiana v. Jumel, 107 U. S., 711*). Nor does the act of the State complained of in the case at bar differ in essence from the act of the State of Georgia in declaring void the grant of certain lands to Gunn and others, which was the subject of consideration in the leading case of *Fletcher v. Peck, 6 Cranch, 87;* or from the act of the State of Arkanas in forbidding the reception in the payment of taxes of the notes of the Bank of the State of Arkansas, which, by the charter of the Bank, the State had agreed should be received in payment of all debts due to it (*Woodruff v. Trapnall, 10 How., 190*), or from the act of the State of Tennessee in repealing a similar provision of the charter of the Bank of Tennessee, which repeal was applied by the state courts to notes outstanding at the date of the appeal (*Furman v. Nichol, 8 Wall., 44*); or from the act of the same State in declaring, through its Constitution of 1865, all notes of the Bank of Tennessee issued after the adoption of the Ordinance of Secession to be null and void (*Keith v. Clark, 97 U. S., 454*); or from any one of the various acts of the State of Virginia designed to prevent the reception in payment of taxes of the coupons attached to its refunding bonds issued under the Act of 1871, wherein it was agreed that such coupons should be receivable in payment of all taxes and dues to the State (*Poindexter v. Greenhow, 114 U. S., 270; McCullough v. Virginia, 172 U. S., 102*).

Each of the constitutional provisions, statutes, ordinances and resolutions above mentioned was merely a formal legisla-

tive repudiation of a pre-existing obligation, and (except that considered in *Fletcher v. Peck*) was, in the last analysis, a refusal, in just the same sense that the resolution now under consideration is a refusal, to make payments that the repudiating party had agreed to make. Yet each of these enactments has been held to be a law within the meaning of the impairment clause of the Constitution. The resolutoin of August 20, 1897, was such a law.

II.

It is a common error to assume, because a state court has devoted its attention solely to the construction of the contract set up, and, by interpreting this contract in such manner that the subsequent law which is the object of attack cannot conflict with it, has avoided any consideration of or reference to that law, that the decision has not been in favor of the validity of the law. But it can hardly be necessary to say that any decision, the necessary result of which is to give effect to such a law is a decision in favor of its validity, or, to repeat what this court has so often said, that even if the judgment of the state court has proceeded solely upon the contract, declaring it invalid or that it should have a construction different from that contended for by the plaintiff in error, and thereby has given effect to a subsequent law which, as the plaintiff in error claims, impairs the obligation of the contract, jurisdiction to review such judgment resides in this court.

See

Bridge Proprietors v. Hoboken Co., 1 Wall., 116, pp. 144, 145.
Furman v. Nichol, 8 Wall., 44, p. 56.
University v. People, 99 U. S., 309, p. 321.
Wright v. Nagle, 101 U. S., 789, p. 794.
Life Ins. Co. v. Needles, 113 U. S., 574, p. 579.
Louisville Gas Co. v. Citizens' Gas Co., 115 U. S., 688.
Fisk v. Jefferson Police Jury, 116 U. S,, 131.
Chapman v. Goodnow, 123 U. S., 540, p. 548.
Huntington v. Attril, 146 U. S., 658, p. 684.

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Wilmington, &c. R. R. v. Alsbrook, 146 U. S., 279, p. 293.
Mobile & Ohio R. R. v. Tennessee, 153 U. S., 486, p. 492.
Water Power Co. v. Street Ry. Co., 172 U. S., 475, p. 487.
McCullough v. Virginia, 172 U. S., 102, pp. 116–123.
Houston, &c. R. R. v. Texas, 177 U. S., 66, p. 77.
M. & St. Louis Ry. Co. v. Gardner, 177 U. S., 332, p. 340.

And it must be borne in mind that the expression "to give effect to," so often used by this court in discussions of this question, does not necessarily mean "to carry into effect," that is "to execute." In many cases, and necessarily in every case in which the law alleged to impair a contract obligation operates negatively, the decision of a court can give effect to the law only in the sense that the decision permits the law to operate upon the rights of the parties, leaves the parties in a situation or relationship that has arisen by reason of the existence of the law.

As an example of the truth of this, take the case of *Murray v. Charleston (96 U. S., 432)*. The City of Charleston levied a tax upon its city stock under the authority of a law that antedated the Federal Constitution. It was not and could not have been claimed that this law impaired the obligation to pay interest created by the contract contained in the stock. But the City Council also directed the City Treasurer to withhold an amount equal to the tax thus levied from the interest upon the stock when the same should become payable. Accordingly, when the interest became due, only four per cent. was paid instead of the six per cent. payable by the terms of the certificates. Murray sued to recover the amount remaining unpaid. The state court gave judgment for the defendant. This judgment, of course, did not carry into effect the Council's direction to the Treasurer. The ordinance had already operated by inducing the non-action of the officer. The judgment simply left the parties in a situation that had its origin and cause in the ordinance. The case was brought to this court upon writ

of error and the question of jurisdiction was raised. But this court held, in effect, that the case involved the question whether the operation of the ordinance upon the contract had been lawful, and therefore that the validity of the ordinance was directly brought into question and affirmed its own jurisdiction.

An equally good example may be found in *Fisk* vs. *Jefferson Police Jury* (*116 V. S., 131*).

Fisk had performed services as District Attorney for the Parish of Jefferson during the years 1871, 1872, 1873 and 1874. During this period there was in force a statute, enacted by the Legislature of Louisiana in 1871, whereby it was provided that no municipal corporation should levy a tax for any purpose that should exceed two per centum of the assessed valuation of the property therein listed for taxation. But by the Louisiana Constitution of 1880 it was declared that no parish or municipal tax for all purposes whatsoever should exceed ten mills on the dollar of valuation. Fisk recovered judgments against the Policy Jury (the governing body of the Parish) for the salary and fees due him, and, being unable to obtain payment of these judgments, made application for writs of mandamus to compel the assessment and collection of a tax therefor. The Police Jury answered, showing that at the time the applications for mandamus were made they had already levied the full amount of taxes permissible by law (*i. e.*, under the Constitution of 1880). Fisk contended that the provision of the Constitution of 1880 referred to impaired the obligation of his contracts with the Parish, but the Supreme Court of Louisiana held that he had no such contracts and disposed of the case solely upon that ground. This decision did not carry into effect the constitutional provision, but it confirmed the effect which that provision had had upon the situation of the parties —left them in the situation into which the Constitution had brought them. This was its only effect. This Court assumed jurisdiction without question and reversed the judgment below upon the ground that the provision of the Constitution of 1880 mentioned above impaired the obligations of Fisk's contracts.

Examples might be multiplied almost without end, but enough must have been said to make it plain that if the exist-

ing situation of the parties has been produced by a law, the validity of which has been drawn in question, and the judgment of the State Court leaves that situation undisturbed, effect is given to the law, the operation of the law is upheld, or, in the words of the Revised Statutes, the decision is in favor of the validity of the law.

Furthermore, if the result of the decision of the state court is to give effect to the obnoxious law, jurisdiction will exist even though the party successful in the that court may not have claimed anything in the action by virtue of the law.

The purpose of Section 10 of Article 1 of the Federal Constitution is to prevent the impairment of contract obligations by act of the state. It is a duty, with which this Court is charged, to see to it, in all cases in which the statute permits it to exercise jurisdiction, that this command of the Constitution is obeyed. So far as concerns this subject, the statute conferring jurisdiction (R. S., § 709) requires only that it shall have been claimed below that a state law has impaired the obligation of a contract relied upon by one party, and that the decision of the state court shall have upheld the law. It may be, and very likely is, true that cases in which a law *can* operate in such manner as to impair the obligation of a contract thus relied upon without at the same time necessarily forming the foundation of the adverse claim are comparatively few, but that fact cannot operate to circumscribe the jurisdiction of this court. If this court were to hold that it can take jurisdiction only of those cases in which the party that is in fact deriving advantage from the subsequent law chooses to justify under the law, it would in so doing not only arbitrarily limit its own jurisdiction as established by statute, but disable itself to perform in important cases one of its most solemn duties.

See

Murray v. Charleston, 96 U. S., 432.
McCullough v. Virginia, 172 U. S., 102.
Houston, &c. R. R. Co. v. Texas, 177 U., 66, p. 78,

which are directly in point.

It is true that in *Murray v. Charleston*, the city set forth in its answer the ordinances that were the subject of attack, but

this was done for the purpose of showing the regularity of the tax levy, and not for the purpose of claiming anything under the sections directing the retention of a portion of the interest. The city claimed a common law right to set off its claim for taxes against Murray's claim for interest and its counsel contended that the provision for retention of interest was mere surplusage (*96 U. S., p. 438*). In both *McCullough v. Virginia* and *Houston & Texas Central Railroad Company v. Texas*, the existence and operation of the obnoxious laws were apparently called to the attention of the Court only by the party attacking them.

We may then regard it as settled that, if the decision of the highest court of a state results in confirming and perpetuating a situation into which the parties have been brought by a law of the state that in the State Court was assailed by one of them as impairing the obligation of a contract upon which the attacking party relies, such decision is in favor of the validity of the law regardless of the party by whom the subsequent law was brought to the attention of the court.

We are brought, then, to the question: was the decision of the state court in this case in favor of the validity of the Resolution of August 20, 1897? Unquestionably it was. It decided that the action directed by the Resolution and subsequently taken was lawful and proper, which in substance is exactly equivalent to an express decision that the Resolution was and is valid. Nor was this merely the decision of an academic question. The judgment of the Minnesota Court gave effect to the Resolution—or, to be exact, confirmed and perpetuated the effect that the resolution had produced upon the situation of the Company and the City, respectively. What was this effect? Assuming, as we must for the purposes of this discussion, that the construction of Section 9 of the Gas Company's charter that is contended for by the Company is correct, the City has been at all times sinces 1856, under obligation to pay the Company interest at the rate of eight per cent. per annum upon the cost of every one of the 3362 lamps erected by the Company by direction of the City, without regard to whether such lamps has been at any given time employed in the city service. This obligation, up to the time of the adoption of the

Resolution of August 20, 1897, the City faithfully discharged. We know that it paid interest for the year 1896, during which many posts were out of service, upon the cost of the whole number of posts thus erected. Assuming, also, as we are entitled to assume in discussing this question, that the Gas Company's construction of Section 9 is not only correct but *plainly and unmistakably* correct, it is to be conclusively presumed that every city official would have understood and have assisted to perform the City's obligation, and therefore that the City would have continued to live up to its contract had not this resolution or some other enactment having the same effect intervened. Then came the Resolution. The City ceased to make payments of interest upon the cost of lamps not in service. We know, so far as we can know the cause that produces any effect, that the Resolution prevented further payments of interest upon the cost of the lamps mentioned. It altered the situation of the parties. As a consequence of its adoption, the money that should have gone into the treasury of the Gas Company remained in the treasury of the City. Then came this action, the whole end and aim of which was to undo the effect of the Resolution and to restore the parties to the situation they would have occupied had the Resolution not been passed. Had the judgment of the Ramsey County District Court been affirmed by the Minnesota Supreme Court, the action would have accomplished this object. But the judgment of the Supreme Court that actually was rendered confirmed and perpetuated the situation produced by the resolution, thus, within the meaning of the decisions of this Court "upholding" and "giving effect" to it.

But, it may be said, all this is based upon an assumption—the assumption that but for this resolution the City would have gone on paying interest. "Do you know," it may be asked, "that even in the absence of this resolution the City Comptroller might not have refused to audit the Gas Company's claim for interest, or, in case he did audit it, the City Council have refused to authorize its payment, or, if the claim had passed both the Comptroller and the Council, the Mayor or the City Clerk have refused to sign a warrant for its payment, or the City Treasurer have refused to pay the warrant when pre-

sented; and, if not, how do you know that this resolution made the situation of the parties what it is?"

The answer must be, "No, we do not *know* that any of these things might not have happened, but that is immaterial. We are concerned not with what might have been but with what is. We know that it was in fact this resolution that caused the cessation of interest payments in the same way in which we know that any human action is attributable to a given cause. As has already been shown, its adoption made the city's failure to pay interest absolutely inevitable. The failure was a necessary consequence of the Resolution. So far as appears, the Resolution was the sole cause of the failure to pay. A presumption arises that it was the efficient cause, and until this presumption is rebutted by something better than a metaphysical demonstration that all knowledge is illusory, this presumption must be accepted."

How did the Court know in *Murray v. Charleston* (*supra*) that the failure of the city to pay the interest upon the city stock was an effect of the city ordinance? The City Treasurer, according to the law as announced by the Supreme Court of South Carolina, would have been justified in setting off the city's claim for taxes against the stock owner's claim for interest in the absence of any ordinance. He might have done so. Yet this court found no difficulty in reaching the conclusion that the failure to pay the interest in full was the effect of the ordinance.

See also

McCullough v. Virginia, 172 U. S., 102;
Houston, etc., R. R. Co. v. Texas, 177 U. S., 66;

in each of which the connection between the law and the action complained of was deduced from the circumstances.

Moreover, the operation of the resolution as the animating cause of the City's failure to pay interest cannot be denied and, by reasonable intendment, appears upon the record. The Gas Company's complaint which, it must be remembered, was drawn upon the theory that the questions in the case were to be raised by demurrer, after setting forth the directions for the erection of the 3,362 posts, the fact of

their erection in accordance with such directions, the cost thereof, the numbers in service from January 1, to April 30, 1897, and from May 1, to December 31, respectively, and the amount of the interest accruing during the year, alleges—all in direct connection—the passage of the Resolution of August 20, 1897 (setting out the same in full), the demands by the Company for payment of the 1897 interest, the payments made and the failure of the City to pay the balance sued for, and then—still in the same connection—continues:

"Plaintiff further alleges that said resolution of said Common Council of said defendant City, approved August 20, 1897, and above set forth, and all acts of the Legislature of the State of Minnesota, if any there be, which empowered said Council to pass same, *and all acts and doings of defendant thereunder*, are in direct and necessary violation of Section 11, Article I, of the Constitution of the State of Minnesota, and of Section 10 of Article I, of the Constitution of the United States, and of Section 1 of Article XIV of the amendments to said Constitution of the United States."

Certainly this can have but one meaning, viz., that the City's failure to pay was the direct result of the Resolution. The City's answer, therefore, by reasonable inference admits this in the following clause which is the only allegation of the answer with reference to the subjects therein mentioned:

"Defendant further admits that on or before the twentieth day of August, 1897, the Common Council of defendant passed the resolution set forth in folios twenty and twenty one of said complaint, and thereafter that said plaintiff made demand of the defendant for the sums of money alleged in said complaint, and that defendant paid to plaintiff at the times alleged in said complaint the sums therein set forth."

That the non payment of the interest which is the subject of suit was the result of the adoption of the Resolution also appears by the certificate of the Chief Justice of the Supreme Court of Minnesota (*Printed Record, fol. 12*), wherein it is set out that the decision of the Court was in favor of the validity of the Resolution. Under the decisions of this Court it is proper to refer to that certificate for the purpose of rendering clearer and more certain anything that appears too indefinitely by the record.

Parmalee v. Lawrence, 11 Wall. 36, p. 38.
Caperton v. Bowyer, 14 Wall. 216, p. 234.
Roby v. Colehour, 146 U. S., 153, p. 159.

The allegations of the pleadings and the certificate of the Chief Justice taken together render the connection between the Resolution and the subsequent action of the City plain upon the face of the record.

But this is certainly enough in answer to an objection that is at best too metaphysical to recommend itself as possessing substantial merit.

The truth of the essential contention, viz., that the decision of the state court gave effect to the resolution, may be illustrated by a suppositious case: Suppose the Gas Company, instead of suing the City, had applied for a writ of mandamus to compel the City Comptroller to audit its claim, and the Comptroller had answered, justifying under the Resolution and also denying the City's liability, but without alleging that his failure to audit the claim had been caused by the Resolution. Suppose, also, that the Supreme Court had decided the case in favor of the Comptroller but upon the same opinion filed in this case. Could there have been any question in such case that the decision of the state court had given effect to the resolution? Assuredly not. The case supposed is, in essence, the case of *Hartman v. Greenhow* (*102 U. S., 672*). And, certainly if it be admitted that in this suppositious case the judgment would have given effect to the resolution, it must be admitted that the judgment in the present case did likewise, for the result ensuing is identical.

But if there be any doubt remaining concerning this matter, it may be resolved by an examination of a few of the decisions of this Court.

I have already referred several times to the case *Murray v. Charleston* (*96 U. S., 432*). This was an action at law brought by the owner of certificates of stock of the City of Charleston to recover a portion of the interest due thereon in accordance with their terms and then unpaid. The charter of the City, which in this particular consisted simply of re-enactments of statutes that antedated the Federal Constitution, empowered

the City Council to levy taxes upon all those holding property within the City. In 1870 and 1871 the Council passed the usual ordinance levying in each case a tax of two per cent. upon all property within its jurisdiction, and to each ordinance added a section directing the City Treasurer to withhold from the amount of interest payable to each stockowner the amount of the tax assessed upon his stock. Presumably in consequence of this enactment, Murray received only four per cent. instead of six per cent. upon his stock. He therefore brought suit for the unpaid balance. His main contention in the action was that being, as he was, a non-resident, the City Council had no jurisdiction to levy a tax upon his stock. He also set up the invalidity under the Federal Constitution of the section directing the setting-off of the tax-claim against the interest claim. Although the City set out the ordinance in full in its answer, this apparently was, as I have already said, only for the purpose of showing that the tax had been regularly levied. It did not rely upon or claim any rights under the section providing for the setting off of the tax—indeed, it is difficult to understand how it could have done so. Neither of the state courts founded its judgment upon these sections. The decision was that the City had the power and jurisdiction to tax Murray's stock, and further that it had the common-law right to set off its claim for taxes against Murray's claim for interest as it had done. The judgment simply denied Murray all relief and left the parties in the situation into which presumably they had been brought by the city ordinance. This court held that it possessed jurisdiction upon writ of error to the state court, upon the ground that the judgment of the latter had upheld the ordinance, and reversed that judgment upon the ground that the ordinance was a law of South Carolina impairing the obligation of the contract contained in the certificate of city stock. It is difficult to imagine a case in principle more nearly parallel to the case at bar.

Perhaps still more clearly in point is the case of *McCullough v. Virginia* (*172 U. S., 102*). The material facts in this case are the following:

In 1871 the Legislature of Virginia passed the first of its now

famous Refunding Acts, whereby it was provided, among other things, that the coupons attached to the refunding bonds to be issued under the act should be receivable for all taxes and dues to the State. During the period between 1882 and 1887, inclusive, the Legislature passed various other acts intended to render nugatory this provision of the Act of 1871, and, among others, an act (passed in 1887) providing that it should not be lawful for any tax officer to receive "anything else than gold or silver coin, United States treasury notes or national bank notes" in payment of taxes or dues. In 1892 McCullough, acting under the authority of one of the acts of 1882, filed his suit in the Circuit Court of the City of Norfolk to establish the genuineness of certain coupons that had been tendered by him in payment of taxes. The State did not found its defense upon any of the repudiatory acts of the Legislature, but attacked the Refunding Act itself as unconstitutional as a whole, because admittedly unconstitutional so far as school taxes were concerned. This contention, although overruled by the trial court, was sustained by the Virginia Court of Appeals, which placed its decision solely upon this ground. The effect of its judgment was simply to leave the parties in the situation in which they had been placed (presumably) by the Act of 1887. The State of Virginia had refused to pay its coupons in the manner in which it had agreed to pay them, and this refusal had been confirmed and its results perpetuated by the decision of the Court of Appeals. The suit having been removed to this Court, the jurisdiction was challenged, but the Court, speaking through Mr. Justice Brewer, held, in substance, that since the decision of the Virginia Court had given effect to the act of the State in refusing to accept the coupons in payment of taxes, that is to say, in refusing to pay the coupons by permitting them to be set off against its claim for taxes, which act had been induced by the Statute of 1887, the decision had given effect to the statute. Jurisdiction was asserted and the judgment below reversed.

Equally instructive is the case of *Houston & Texas Central Railroad Company v. Texas* (*177 U. S. 66*), the facts involved in which were the following:

During the Civil War the Legislature of Texas enacted laws permitting railway companies indebted to the Special School Fund to pay the principal of and interest upon their respective debts in treasury warrants of the State. The predecessors of the plaintiff-in-error—which were among the companies entitled to the benefit of this Act—made such payments in considerable amounts. In 1870 the Legislature passed another act providing that if each of the debtor companies, many of which were in default, would immediately pay six months' interest upon its aggregate indebtedness to the School Fund and also an amount equal to one per cent. of such indebtedness, to be applied as a sinking fund in liquidation of the debt itself, and would continue such payment semi-annually, the State would not take advantage of the previous defaults, but that if such company should fail for ten days after demand to make any such payment. the whole debt of such company should become due and the Governor should proceed without delay to foreclose the mortgage held by the State to secure the railway company's indebtedness. The state officials to whom the first payments under this act were tendered, decided for themselves that the payments theretofore made in warrants were void, and demanded from the predecessors of the plaintiff in error interest upon an amount of debt computed without allowance for any of these payments. These companies and the plaintiff in error from year to year made the payments demanded by the state officials until the indebtedness of the companies had been wiped out, assuming that the payments made in warrants had been valid payments. Each of the payments made after the passage of the Law of 1870 was, however, made under a written protest asserting the right of the Railroad Company to credit for the payments made in warrants. Payments then ceased. The Governor, acting upon the theory that had from the beginning been asserted by the state officials, instituted proceedings to foreclose the state mortgage. The Railroad Company pleaded payment and set up the unconstitutionality of the Act of 1870 as interpreted by the state officials, asserting that as so interpreted the Act impaired the obligation of the contract contained in the original law permitting payments to be made in warrants. The State did not plead, or in any way found its suit upon, the Act of 1870, but

planted itself upon the proposition that the payments made in warrants were void because the warrants had been issued to circulate as money and in aid of the Rebellion. The Court of Civil Appeals, the highest court of the State in which judgment could be had sustained the contention of the State and decreed the foreclosure of the State's mortgage and sale of such of the Railroad Company's lines as were in existence in 1870. The Court's decision did not in any way refer to the Act of 1870. The case having been removed to this court by writ of error, the jurisdiction of the court was attacked upon the ground that the Court of Civil Appeals had not upheld or given effect to the Act of 1870. This court, however, held that the foreclosure suit itself had been induced by that act and that the judgment that rendered the suit effectual gave effect to the law. Its line of reasoning seems to have been this: The contract between the State and the mortgagor companies was that when their debts had been paid in warrants it would no longer assert any claim upon their property. The Act of 1870, as interpreted by the State officials, intervened and caused the Governor to assert the lien of the State and the State to violate its contract. The judgment of the Texas Court upheld this proceeding on the part of the State, and therefore gave effect to the Act of 1870. This court took jurisdiction and reversed the judgment below. The judgment of the Court of Civil Appeals had not in any way, as against the Railroad Company, carried into effect the Act of 1870. It had, however rendered effective and binding the State's repudiation of its contract, which repudiation had occurred through the action of the State officials, but had its natural and apparently proximate cause in the Act of 1870.

But counsel for the City will probably end as he began by asserting that to hold jurisdiction of this case means that this court must take jurisdiction of every case arising from the failure of a city to pay its debts—a palpable absurdity. Is this true? Certainly not. But, if the question be properly

raised, this court has jurisdiction of every case in which a body exercising within a city the legislative power of the state repudiates the city's obligations. Default is one thing. Formal repudiation is quite another. Default is merely passive. It may signify misfortune or carelessness. It leaves room for reconsideration and good faith. It may occur through the action or non-action of administrative or merely ministerial officers. Repudiation is active, deliberate, final, dishonest, and must arise from legislative acts. At it the Constitution aims its prohibition. To prevent it, or render it ineffectual, was the primary purpose of the clause prohibiting laws impairing contract obligations. That the various purposes of the Constitution (and this purpose among others) might not fail of realization, this court was established. It must have and, in fact, has jurisdiction to review every decision that sanctions repudiation by legislative enactment, and, therefore, to review the judgment of the court below in the present case. And it may be said with entire truth that if this Court has not jurisdiction of this case, few cases of simple repudiation can reach its bar. It can rarely happen that any state or municipality will formally and by legislative enactment repudiate one of its obligations unless there be some legal pretext upon which to claim that no obligation, in fact, exists. It is also a matter of the commonest knowledge that under the American Constitutions, State or Federal, no right whatever can really or finally be created or established by a law of repudiation. As a consequence, such a law may be effective to produce a default in the performance of obligations and to compel the institution of suit, but it will rarely be pleaded as a justification for the default. When counsel for the repudiating government pleads its case, he will set up, not the law that is the real cause of the litigation, but the alleged infirmity of the obligation; and the decision of the state court in favor of his contention, although it will sanction and render effectual the unconstitutional law, will ignore the very existence of the law itself. This case will be reproduced. Thus it will be seen that to refuse to take jurisdiction of this case would be to shut the doors of the Court to many of the suitors for whose benefit the Constitu-

tion, of which the Court is the guardian and executant, was established.

I respectfully submit that the Court possesses jurisdiction to review the judgment rendered below.

BY CONTRACT, THE TERMS OF WHICH ARE EXPRESSED IN SECTION 9 OF THE GAS COMPANY'S CHARTER, THE CITY OF ST. PAUL IS UNDER OBLIGATION TO PAY THE COMPANY INTEREST AT THE RATE OF EIGHT PER CENT. PER ANNUM UPON THE AMOUNT OF THE COST OF EVERY STREET LAMP ERECTED IN OBEDIENCE TO THE CITY'S DIRECTION, FOR THE WHOLE PERIOD ELAPSING BETWEEN THE DATE OF THE ERECTION OF SUCH LAMP AND JANUARY 1, 1907, THE DATE FOR THE EXPIRATION OF THE COMPANY'S CHARTER.

The City and the Company agree, as I understand it, that upon the erection of each of the street lamps furnished by the Company in obedience to directions given by the City, a contract arose with reference to the payment by the City to the Company of interest upon the cost of such lamp, the terms of which are expressed by the proviso contained in Section 9 of the Company's charter. There is, however, a radical difference of views as to the proper construction of this proviso. It reads as follows:

"PROVIDED, That whenever the corporation of the City of St. Paul shall, by resolution of the Board of Aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cent. *per annum* on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same."

The Company's contention is that this provision binds the Company, whenever an order of the kind prescribed

is given by the City, to furnish and erect street lamps in such numbers and at such points on its mains as may be required by the City's order, and to do this without reference to whether any contract for lighting the lamps shall first have been entered into; and that the provision likewise binds the City to pay the Company interest at the rate and times stipulated upon the cost of each lamp so erected for the whole period elapsing between the date of its erection and that of the expiration of the Company's charter.

The City's contention is that the provision does not bind the Company to erect any lamp upon the City's order unless or until a contract for the lighting of the same has been voluntarily entered into by the City and the Company; that it binds the Company to furnish and erect such lamps as it may thus have contracted to light, provided the City has directed or shall direct it to erect and light them; and that it binds the City to pay interest at the rate and times stipulated upon the cost of every lamp so erected as long as the same remains in the service of the City and no longer.

This latter construction of the provision was adopted by the Supreme Court of Minnesota. Nevertheless this court must, of course, construe the contract for itself, even though the terms thereof are expressed in the form of a statute of the State.

Jefferson Branch Bank v. Skelly, 1 Black, 436.
Fursman v. Nichol, 8 Wall., 44, pp. 58 and 59.
Louisville Gas Co. v. Citizens' Gas Co., 115 U. S., 683, p. 697.
McCullough v. Virginia, 172 U. S., 102, p. 109.

What, then, is the contract? Or, to make the question more specific, what is the proper construction of the proviso quoted with reference to the period for which the City's obligation endures?

The first point that will be noticed by any one who examines the Gas Company's charter must be that the construction naturally suggested by the relation of each of the parties to the subject matter of the provision is that contended for by the

Company. This assertion, so far as it concerns the Company's obligation to furnish and erect lamps, cannot be disputed. Nor is it less true when applied to the City's obligation to pay interest. It is expressly stated that the payments to be made by the City are to be made in consideration of the Company's making certain investments. But for this provision, these investments must have been made by the City, for street lamps, like other fixtures, are ordinarily supplied at the expense of the consumer. The Legislature transferred the burden of the investment and consequent ultimate loss of capital to the Company, but left the interest-loss where it ordinarily would have been, upon the City. The natural inference from such an arrangement certainly is that the City was intended to bear this loss as long as the loss itself should continue, subject only to the necessary limitation that the obligation to make payments must cease with the life of the payee and the expiration of all its rights.

A critical examination of the Act confirms this instinctive conclusion.

The provision that is the subject of dispute is in the form of a proviso, a form which usually indicates that the matter contained in the proviso constitutes an exception in some particular to the rule established by the principal clause to which the provso is attached. In the case under discussion the principal clause provides that the Company shall make extensions of its main pipes as fast as the business obtainable in any given section of the City becomes, in the judgment of the Company's Board of Directors, sufficient to enable the Company to defray the expenses thereof by means of the income therefrom. This establishes a qualified—perhaps merely a moral—obligation. It arises as soon as a certain income from the prospective lighting business can be foreseen with reasonable certainty, but the decision as to whether the condition precedent exists is to be made by the Company. The proviso treats another branch of the same general subject—the Company's obligation to do construction work—but in this case the obligation is unqualified so far as the language employed is concerned, provision is made for an assured income, and the decision as to the propriety of the work is confided to

the City. The fact that the obligation is expressed in the form appropriate to the creation of an exception to the rule established in the principal clause and that the antithesis of the provisions of the two clauses is so pronounced, tends to confirm the conclusion that the obligation treated in it was not intended to be a qualified or conditional obligation. Then, too, the very fact that the Legislature was careful to express in the principal clause of Section 9 the condition upon which the Company's obligation to extend its mains depends, raises a strong presumption that if it had intended the obligation to erect street-lamps to be a qualified or conditional obligation, it would have been equally careful to express the qualification or condition intended, and therefore that the unqualified language employed in the proviso was used *ex industria* in order that the obligation there created should be understood to be an absolute one.

On the other hand, the proviso requires the City to pay interest upon the "amount *of the sum of* the original cost of said street lamps;" that is to say, the amount of the cost of *all* lamps that the Company may "furnish * * * and keep in good repair" at the order of the City. The use of the expression "the amount *of the sum of*" indicates the expectation of the Legislature that interest would be paid upon the cost of all the lamps thus furnished, at least as long as it should be paid upon the cost of any. (This was a reasonable expectation, for the life of a street lamp that is kept in good repair exceeds fifty years.) Had it been the intention to limit payments to interest upon the cost of lamps in service, the language employed would naturally have been "the amount of the original cost of said street lamps * * * *for the time being in service*," or equivalent words. If the Legislature had intended that interest should be paid upon the amount of the cost of each street lamp only so long as it should remain in service, how natural and easy (how seemingly necessary, considering the strength of the contrary inference) it would have been to say so.

And is not the very silence of the interest clause upon the subject of the duration of the obligation imposed by it significant? This provision is but one of many composing the Company's charter. Like most of the remaining provisions, it

imposes burdens and creates rights. These burdens and rights are as essentially elements of the constitution of the corporation as are any of the other obligations or rights imposed or granted by the charter. None of the other provisions, excepting only those contained in Sections 10 and 11, which establish the City's right to purchase the Company's works, defines the duration of any obligation or right created by it. There is nothing in the language of the interest clause to indicate that it differs in respect of the period for which the obligation established by it is to endure from the other provision of the charter that are expressed in like general terms. Does not, then, the silence of this clause upon this subject indicate that this provision is to be governed by the same rule that is prescribed for the provisions of the Act generally? If so, all doubts are resolved by the Act itself. The period during which the rights granted and obligations imposed in general terms are to continue, is defined in Section 15, which expressly declares that, in case of failure on the part of the City to exercise its options to purchase, "this Act shall be in full force" until January 1, 1907. This expression, when applied to the charter of a corporation, must be taken to mean not merely that the Act shall retain its virtue as a law for the period specified, but that the rights granted and obligations imposed by the Act shall continue for that period.

The conclusions thus arrived at receive the strongest confirmation when we come to consider the purpose of the proviso under discussion. That purpose is manifest. The object of the Act as a whole was to promote, in the interest of the inhabitants of St. Paul, an enterprise of great public utility. The *ultimate* purpose of this proviso was to assist the City to secure gas lights for its streets at such times and in such numbers as it might require them—just as the ultimate purpose of the whole section was to assist the City to obtain gas-lighting of all sorts.

It was naturally anticipated that the principal obstacle that would stand in the way of proper street-lighting would be found in the reluctance of both the city and the company to make the necessary investments at the times required. But this matter of lighting the streets of the capital city of the State was one of paramount importance and the

Legislature evidently determined (1) to remove, in part, the obstacle of the city's reluctance to spend its money by placing the burden of this expense upon the Gas Company, and (2) to leave the company without any option to refuse to make or to postpone such investments, and therefore bound it to erect street lamps when and at such points on its mains as the City might designate. The *immediate* purpose of the provision was to transfer the duty to provide street lamps from the City to the Company and to enable the City *to compel* the Company to do the necessary construction work; and it is not to be supposed, if the Legislature inserted the provision with such purpose, that it intended the obligation of the Company to be conditioned upon anything other than the expression of the City's election. But this provision standing alone would have been fraught with danger of serious injustice to the Company. The City might in that case have ordered large numbers of lamps to be erected and lighted, only to throw them out of service at the end of some brief term. Such a proceeding might easily have resulted in the bankruptcy of the Company. Moreover, it was the policy of the Legislature, already manifested in the principal clause of the proviso, to require the Company to make investments only upon the assurance of proper returns thereon. The Legislature therefore sought to couple with the obligation of the Company an obligation of the City of a character calculated to render such an arbitrary proceeding upon the part of the City unlikely and to assure the Company a reasonable return upon its investment. The interest clause was devised, and wisely devised, in order to accomplish this object. But this clause, if the obligation of the Company to furnish and erect lamps is an absolute one, cannot accomplish this or any other object unless the City's obligation to pay interest upon the cost of a lamp continues after lighting service by means of the lamp ceases. Otherwise it would neither form a check upon arbitrary action by the City nor assure the Company an income upon its investment for a single day. Nor would it be of any value even if the City were prepared to enter into a long contract for lighting the lamps ordered. The provision is and must be substantially inoperative as long as service

continues, for the revenue accruing to the Gas Company from this service must be and in fact always has been taken into consideration by both parties in determining the price to be charged or paid for the lighting service. It is only when the service is discontinued that the provision becomes really operative, and then it provides but scant justice to the Company. A street lamp once erected is unsalable, and when once used and abandoned becomes almost absolutely valueless, in which case the capital of the owner is not merely tied up; it is practically annihilated. Certainly, it is but a small measure of justice to assure him interest upon his investment for the balance of the period for which he has embarked upon his enterprise. In this connection too, it should be remembered, that in 1856, when the Gas Company's charter was granted, the common rate of interest in Minnesota was from two and one-half to three per cent. per month; that is to say, from thirty to thirty-six per cent. per annum. Eight per cent. then was equivalent to less than one and three-fifths per cent. at the present time. If a provision identical with the one under consideration in other particulars, but fixing the rate payable at one and three-fifths per cent. instead of eight per cent. were incorporated in a charter of the present day, every one, probably, would regard it as an eminently reasonable piece of legislation.

The construction of the provision in question that is suggested above is natural, is indicated by the form and language of the provision itself and by the context, gives effect to the evident purpose of the Legislature, is thoroughly consistent, and harmonizes with the dictates of both policy and justice.

Let us turn now to the construction of the provision that was adopted by the City Council of St. Paul, and sanctioned and applied by the Supreme Court of Minnesota. The first thing that will strike any one who considers the subject is, that it reads into the proviso construed conditions and limitations of which the Act contains no suggestion, however remote; that it ignores the situation of the parties, as well as the form and phraseology of Section 9; and that it conflicts with the literal application of that clause of Section 15 of the Company's charter which provides that the act, includ-

ing, presumably, all the rights and obligations established by it, shall, under the circumstances now existing, continue in full force until January 1, 1907.

But the reflection that most forcibly strikes one when considering this theory is that the construction announced subverts the whole purpose of the provision construed. It cannot be denied that the purpose of the provision was to assist the city to provide itself with street lighting, *by placing the burden of supplying the lamps upon the Company and by taking from it both the right and the incentive to refuse to make the requisite investments;* and yet the State Court expressly says that the provision did not attain this end.

Justice CANTY, speaking for the Court, says:

"Sec. 9 provides that whenever the city 'by resolution of its Board of Aldermen directs lamps to be erected and lighted in the streets of the city' the gas Co. shall erect the same and keep them in repair; but, as we have seen, the city has no power under the charter to compel the streets to be lighted except by making for that purpose a contract voluntary as to both parties. When making such a contract, the gas Co. can refuse to contract for lighting any street lamps except those already erected, and before the city can compel the erection of more lamps it must first make a contract for lighting them" (*Printed Record, fol. 79*).

The Court's line of reasoning, while somewhat obscure, seems to be that suggested by counsel for the City upon the argument below, which was substantially this: The Gas Company's charter, although it requires the company to obey the city's order to erect street lamps, does not require it to obey an order to light them. It does provide for voluntary contracts for street lighting between the City and the Company. Such contracts, therefore, furnish the only means whereby the City can obtain a supply of gas for its lamps. But the City's power is to order lamps to be erected *and lighted.* If it orders them erected without at the same time ordering them to be lighted, the Gas Company need not obey the direction.

But the Legislature cannot have intended the City to give an order that it would have no power to enforce and therefore must have intended that it should possess itself of power to

order lamps lighted before ordering them erected. As no such power exists unless a contract for street-lighting, voluntary as to both parties, has been made, no order to erect lamps can be given, or if given need be obeyed, in the absence of such contract.

The fundamental fallacy involved in this reasoning lies in the assumption that the Legislature intended the City's authority to give the orders in question and, therefore, the Company's obligation to erect lamps, to depend on the power of the City to enforce its orders. The proviso of Section 9 makes no grant of power to the City. It merely imposes an obligation upon the Company, an obligation that raises a duty upon the City's making a certain election by giving certain directions. Whether the City can compel obedience to both branches or to either branch of its order is immaterial. The order can be given. The right to give it does not depend upon the City's ability to obtain a decree for the specific performance of its terms. Its virtue as an election to call into force the Company's obligation is the same whether it be specifically enforceable or unenforceable. When the order agreed upon has been given, that is, when the City's election has been made, the Company's duty to furnish and erect lamps arises, not by reason of the City's power to enforce its orders, but by force of the statute under which the Company exists and to the terms of which it has consented. Section 9 does not attempt to define the consequences of an order to light the lamps farther than to prescribe its effect upon the matter of their erection, which was the subject with which the Legislature was then exclusively engaged. The requirement that an order to light the lamps should be coupled with an order to erect them doubtless originated in a desire to be just to the Company and to afford it an incentive for prompt obedience to the City's orders. It furnishes an assurance that the lamps when furnished and erected will not constitute a dead investment, but will be the means of enabling the Company to increase its business. There has never been a time when the Company, even though assured of a return upon its outlay of eight per cent. per annum for a considerable time, would not have been most unwilling to tie up its capital in unused street lamps. Until 1890, the rates of interest current in St. Paul equalled or ex

ceeded eight per cent. per annum. After that year the erection of a street lamp in consideration only of payments of interest at the rate of eight per cent. per annum for the remainder of the Company's corporate life would have entailed a heavy loss. The Legislature evidently foresaw the possibility of this, and, accordingly, required every direction to erect lamps to be accompanied by an order to light them. It was not at the moment concerned with the question of the binding force of this order or with its effect upon any subject other than the supply and erection of the lamps.

But the prime source from which error in the reasoning accepted by the state court proceeds is the assumption of a false purpose for the proviso. A careful analysis of the court's decision will make it pretty evident that the court entirely overlooked the fact that the immediate purpose of the proviso was simply and only to bind the Company to furnish street lamps and to erect them whenever and wherever the City might require them. It seems to have assumed that the purpose of the proviso was to enable the City to compel the Company to light the streets. A not unnatural corollary of this assumption was found in the proposition that the provision was intended to operate only when it would afford a direct and unquestionably effective means of securing this result. It was then an easy transition to the conclusion that because the proviso cannot by its unassisted force accomplish this, its assumed object, it should be held inoperative. The mistaken assumption that underlies the Court's thought is not expressed but is implied in every sentence of its opinion. Its conclusion is really, if not nominally, founded upon this assumption, and it was absolutely inevitable that the formal reasoning employed to support such conclusion should fail to withstand the test of logical analysis.

Moreover, in reaching its conclusion the court assumed another false premise which also helps to vitiate its formal reasoning, viz., that the City cannot cause street lamps to be lighted except by means of a contract with the Company. The words "to be * * * lighted," where they occur in Section 9, have not the sense of "to be ignited." They signify "to be supplied with gas," that is, with the material used to produce light. The word "lighting" is used in the same sense in Section 1 of the

Act. This the state court appreciated, for it uses the expression "compel the streets to be lighted" and "procure gas to light its streets" interchangeably. Now the proviso in Section 9 enables the City to obtain lamps for its streets and to cause these lamps to be connected with the Company's mains and to be supplied with meters; in other words, to prepare itself to receive gas. The Gas Company as a public service corporation is presumed to have, can be compelled to have, and as a matter of fact always has had, a public tariff of rates offered to and paid by any one desiring and prepared to take gas from it. The City, irrespective of the provisions of Section 9 and in the absence of special contract, being prepared to receive the gas, has a common law right to require the Company to supply it to the street lamps upon the single condition, implied by the order, that the City shall pay for the gas so furnished at the rate at which it is paid for by other consumers. This right can be enforced by mandatory injunction. That the possibility of this course was contemplated by the Legislature is shown by the mention of *meters* as a portion of the equipment to be provided by the Gas Company. Moreover, if the Gas Company should at any time refuse to light street-lamps upon the order of the City, this would furnish ample ground for the forfeiture of the Gas Company's charter, of which the City would not be slow to take advantage.

It may be suggested here as it was upon the argument below (although it does not appear that the state court attributed any weight to the suggestion), that the words of the proviso "the company shall make contract therefor," indicate an assumption on the part of the Legislature that no obligation to furnish gas could arise in the absence of a voluntary formal contract or even an intention that the obligation to furnish and erect street-lamps should not become absolute until a contract for lighting them should be made. The exact reference of the word "therefor" is doubtful. It may refer to the purchase and erection of the lamps, or to the lighting of them, or to both subjects. But assuming, for the sake of argument only, that the contract contemplated is a street-lighting contract, no inference such as is suggested can reasonably be drawn from the insertion of this phrase. At most, the mak-

ing of a lighting contract is one of several duties enjoined. Upon the exercise of the City's election to that effect, the obligation to perform all these duties became absolute and immediate. This, it seems to me, I have demonstrated. If the phrase under consideration is to be taken as referring to a street-lighting contract it either raises an obligation upon the Company's part to enter into any reasonable contract that may be tendered by the City, which amounts to an obligation to light the lamps at a price representing the reasonable value of the service (and in that case the phrase instead of supporting, absolutely forbids either inference suggested), or—and more probably—it raises a merely moral obligation. Now, certainly the affirmative declaration of the moral duty of the Company to enter into a voluntary street-lighting contract cannot be held to indicate an intention to release it from its common-law obligation to supply gas upon demand. On the other hand, is it to be held, because two obligations, one legal and one moral, one enforceable by forfeiture and the other unenforceable, arise from the performance of the same act, that, although neither the ability to perform the legal obligation nor the utility of its performance depends upon the prior performance of the moral obligation, the obligee may nevertheless postpone the performance of its absolute legal duty to such time, if any, as shall find it prepared and willing to discharge its moral obligation? This would be to hold that coupling a moral obligation with what would otherwise be a legal obligation has the necessary effect of rendering the latter also merely moral—which, of course, would be an absurdity.

The construction advocated by the city also distorts the purpose of the interest clause. If the clause providing for the supply and erection of lamps upon the city's order be construed as requiring their erection upon the giving of the order prescribed, and without other condition, the interest clause can have but one purpose—to assure the company an income upon its investment in case the lamps erected should be thrown out of service. But even if the apparent purpose of the principal clause of the proviso be rejected, the situation of the parties, the language and form of the proviso and of the charter as a whole, the necessity to give some real, and not merely nominal,

effect to the interest clause, and considerations of justice, all still make for the construction of this clause that is contended for by the Gas Company. It therefore became necessary that counsel for the City should suggest some new purpose for the interest-clause, compatible with his theory that interest payments upon the cost of a lamp were to cease with the cessation of service. This he found in an assumed desire on the part of the Legislature to enable the Company to secure reimbursement of its outlay by means of contracts with the City. This theory was accepted by the state court, which, in its opinion, uses the following language:

"It would be unreasonable to hold that the city council might under Sec. 9 compel the gas Co. to erect street lamps and then after using them for a month or a year abandon the use of gas for street lighting purposes and thereby avoid all liability to pay any other compensation for the erection and use of the street lamps. * * * In making such contract the gas Co. can protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the eight per cent. per annum to be paid during that time will remunerate the gas Co. for erecting the lamps" (*Printed Record, fol. 79*).

Now, it is easily susceptible of demonstration that remuneration (by which presumably reimbursement or indemnification is meant) could not have resulted and could not have been expected to result through the operation of this provision. If the Gas Company had undertaken to "protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the eight per cent. per annum to be paid during that time will remunerate the gas Co. for erecting the lamps," it would have been necessary to permit the gross amount of interest collectible to equal the sum of (1) the aggregate amount lost in interest upon the cost of the lamps, calculating such interest for each year at current rates; and (2) that portion of the principal investment represented by the difference between the cost of the lamps and their value as "scrap" at the expiration of the proposed contract. Assuming that the parties would have been able to foresee the prospective fall in

the interest rates, how would this plan have worked? In 1856 (at the time the Gas Company's charter was granted) the ruling rate of interest in St. Paul was thirty-six per cent. per annum; in 1857 money could be obtained with difficulty at fifty per cent. per annum; from 1859 to 1870 the current rate was never less than twelve per cent.; from 1870 to 1881 it was at least ten per cent.; thereafter until 1890 or 1891 it was never less than eight per cent. The current rate even now is six per cent. In other words, there has never been a time that a contract extending over the entire remainder of the Company's charter life would, through the operation of the interest clause, have secured to it any substantial reimbursement of its investment. During a considerable portion of the time, including all the early years of the company's existence, *any* reimbursement would have been absolutely impossible, and during the larger part of the remaining period the amount of the reimbursement would have been insignificant. Even if we suppose that the Legislature intended that the company's interest loss should be calculated at the legal rate only (seven per cent. until 1899), no one will contend that one per cent. per annum could have been supposed to represent the depreciation that would occur in the value of an investment which necessarily was to lose all substantial value at the the end of fifty years. It is apparent, therefore, that as a practical matter the Legislature could not have expected that through the operation of the provision in question the Gas Company would be reimbursed, its investment or indemnified against loss by reason of it.

Moreover, if the City's obligation to pay interest upon any street lamp extends only to the time during which that lamp remains in service under contract with the City, the Company's right to receive interest depends in truth and fact upon the street-lighting contracts entered into between it and the City, and not upon the statute, and as a practical matter this right can have no substantial value, for whenever a street-lighting contract is entered into between the City and the Company the inevitable result must be as I have already pointed out, that the price to be paid per lamp for lighting, plus the interest to be paid per lamp, will exactly equal the price per lamp for lighting that

would have been agreed upon and paid had no such interest clause been inserted in the Company's charter.

Nor does the proviso of Section 9. under this construction, even render easier the agreement of the City and the Company upon a proper street-lighting contract, for, under the provision as thus construed before any obligation upon the part of the Company can arise or it can acquire any rights by reason of the discharge of that obligation, the parties must agree upon the price to be paid for lighting, the amount of indemnification to which the Company is entitled and the length of time required in view of the price charged and the interest to be paid in order to arrive at the point of actual indemnification. They must then agree upon a term equal to or greater than the time so required. Had Section 9 never been enacted, the City and the Company could with the same difficulty, and with no more, have agreed upon a contract producing the same results, for the same right to contract would have existed and the same right to protect itself, which under this provision would justify the Company in insistingupon a price and a term sufficient not only to compensate it for lighting the streets but also to reimburse the loss upon its investment in street lamps, would have justified it in the absence of these provisions in insisting upon the same conditions. In the absence of all statutes, the Company would have had a right to demand interest upon its investment and indemnity against depreciation of the property representing it, as a part of the price of lighting the streets. The provisions of Section 9, under the construction adopted by the state court, become the merest surplusage. It is not credible that if the Legislature had supposed that the same end could have been as well attained by the voluntary action of the parties it would have incorporated these somewhat unusual provisions in the Gas Company's charter. It is to be presumed not only that the provisions were intended to have some effect, but that they are *necessary* to accomplish the effect intended.

These considerations all lead us back to the crucial fact that the Legislature did not contemplate reimbursement by means of this interest clause but did intend to guaranty the Company a return upon its investment in case the City should at any time

choose to dispense with service by means of the street lamps that it had ordered erected.

THE CITY SHOULD BE HELD ESTOPPED TO DENY THE CORRECTNESS OF THE CONSTRUCTION OF THE CONTRACT BETWEEN THE PARTIES CONTENDED FOR BY THE GAS COMPANY.

In a multitude of cases, as expressly appears, the City has ordered the company to erect and light lamps, and it has done this by resolutions of its Board of Aldermen and Common Council and in the absence of contract. This certainly has furnished a practical construction of the provision requiring the Company to erect lamps upon the order of the City. The City has also paid to the Company interest upon the cost of street lamps that were not in use during the period for which the interest was paid. It paid interest for the year 1896-97 upon the cost of all the 3,362 lamps erected by the Company upon its order, although during a part of the year only 3,031 thereof were in use and during another part of the year only 2,690 were in use. By express recitals incorporated in at least four of the contracts entered into between the City and the Company, the city has acknowledged its obligation to pay interest in language that can indicate only its acquiescence in the construction of Section 9 contended for by the Company. In each case the recital is that the City "is under obligation to pay to said party of the first part interest upon the original cost of the street lamps, lamp posts, gas meters, gas pipes and the cost of erecting and laying the same at any time provided by said party of the first part for the service of said party of the second part at the request and order of said party of the second part. * * *"

"The street lamps * * * *at any time* provided" can signify only "all street lamps heretofore provided." In the case of the contract of March 14, 1896, this admission must have been made with full knowledge of the fact that part of the lamps so provided had been thrown out of service, for the contract itself calls for the lighting of only 3,031 lamps (*Finding of Fact, Printed Record, fol.* 67). By these various acts the City has unquestionably given a practical construction to the interest clause. When the meaning of a contract is

doubtful, the construction placed upon it by the practice of the parties is of great weight and often controlling.

First National Bank v. Jagger, 41 Minn., 308.
Staples v. Edwards, 56 Minn., 16.
Hill v. Duluth, 57 Minn., 231.
Topliff v. Topliff, 122 U. S., 121, p. 131.
District v. Gallaher, 124 U. S., 505.

And in view of the fact that during a long series of years the City has insisted upon, and accepted the benefits of, the construction of the provision in question now contended for by the Gas Company, and has entered into contracts with the Company, a part of the consideration for each of which was its express acknowledgment of the obligation that it now denies, it would seem as if it should be held estopped to deny the correctness of the construction so long acquiesced in by both parties. The case should be held to fall within the doctrine of such decisions as

Port Huron v. McCall, 46 Mich., 565, p. 574;
Meyer v. Muscatine, 1 Wall., 385, p. 391;
Van Hostrup v. Madison, 1 Wall., 291, p. 297;
James v. Milwaukee, 16 Wall., 159, p. 162;
Trust Co. v. Mercer County, 170 U. S., 593, p. 600;

in each of which it is held that a municipal or quasi municipal corporation, having accepted and acted upon a certain construction of a statute or contract, and having thereby encouraged others to make investments in reliance upon the correctness of such construction, is estopped to set up a different construction.

THE RESOLUTION OF THE COMMON COUNCIL OF THE CITY OF ST. PAUL, APPROVED AUGUST 20TH, 1897, IS A LAW IMPAIRING THE OBLIGATION OF THE CONTRACT BETWEEN THE CITY AND THE COMPANY, THE TERMS OF WHICH ARE EXPRESSED IN SECTION 9 OF THE COMPANY'S CHARTER.

In discussing the question of jurisdiction, I have attempted to demonstrate that the Resolution of August 20, 1897, is a law of the State of Minnesota and had the effect of preventing the

payment by the City of the interest due to the Gas Company upon the amount of the cost of the street-lamps that are now disused but were furnished and erected in accordance with the various directions given by the City, and that the Resolution will, unless declared unconstitutional by this court, permanently prevent such payments; in other words, that the Resolution, although invalid, has in fact prevented, and if valid would permanently prevent, the discharge of the City's contract obligation and thus render that obligation nugatory. Assuming this to have been established, the Resolution is a law of the State that impairs the obligation of the contract between the City and the Company within the meaning of the impairment clause of the Federal Constitution. It is plain repudiation—an act identical in character with those that gave rise to the constitutional prohibition in question and at which that prohibition was directly aimed. Such acts have many times been declared unconstitutional by this court.

See

Woodruff v. Trapnall, 10 How., 190.
Furman v. Nichol, 8 Wall., 44.
Murray v. Charleston, 96 U. S., 432.
Keith v. Clark, 97 U. S., 454.
Hartman v. Greenhow, 102 U. S., 672.
Wolff v. New Orleans, 103 U. S., 358.
Louisiana v. Jumel, 107 U. S., 711.
Poindexter v. Greenhow, 114 U. S., 270.
Fisk v. Jefferson Police Jury, 116 U. S., 131.
Bier v. McGehee, 148 U. S., 137.
McCullough v. Virginia, 172 U. S., 102.

All of which are upon principle directly in point.

And see

State v. Young, 29 Minn., 474, p. 526.

I respectfully submit that the judgment of the Supreme Court of Minnesota should be reversed and that the judgment of the District Court of Ramsey County should be reinstated and affirmed.

F. W. M. CUTCHEON,
Of Counsel for Plaintiff in Error.

APPENDIX A.

CHARTER

OF THE

ST. PAUL GAS LIGHT COMPANY.

(Sp. Laws, Minn. 1856, Ch. 53 as amended.)

AN ACT TO INCORPORATE THE ST. PAUL GAS LIGHT COMPANY.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

SECTION 1. That Joseph Hoy, Alexander Ramsey, William L. Banning, Edmund Rice and Charles H. Oakes, and their present and future associates, shall be, and are hereby created, constituted and declared to be a body politic and corporate, by the name of the St. Paul Gas Light Company, with full power and authority at any time hereafter to manufacture, make and sell gas, to be made of coal or other material, to be used for the purpose of lighting the City of St. Paul, and the streets, avenues, lanes, alleys and squares thereof, and any building, manufactories or houses therein contained and situate, and to have the exclusive right to lay pipes for the purpose of conducting the gas in any of the streets, avenues, lanes, alleys and squares of the said city, and to adopt any other necessary means to furnish gas to any inhabitants of said city.

SEC. 2. That the capital stock of this corporation shall not exceed two hundred thousand dollars, except in case a majority in interest, of the stockholders, shall, by vote, authorize an increase of such capital stock and that a share in the same shall be fifty dollars; and books of subscription to the said capital stock, or to such portion thereof as from time to time may, by the Directors for the time being, be deemed proper and necessary, shall be opened by the appointment or under the direction of the Directors hereinafter named, subject to such rules, limitations and conditions as by them shall be prescribed, and the stock of the said corporation shall be deemed and considered personal property.

SEC. 3. The stock, property and affairs of the said corporation shall be managed and conducted by, or under the direction of three Directors, being stockholders; that the said Directors shall hold their offices for one year, except as provided by section four in this act, and shall be elected at such time and place within the City of St. Paul as a majority of the Directors, for the time being shall appoint, and that notice of such election shall be given in at least two of the public newspapers printed in the City of St. Paul, at least fourteen days previous to the time of holding such election; and every such election shall be by ballot, and by such of the stockholders who shall attend for that purpose, either in person or by proxy, and each stockholder shall be entitled to one vote for each share of the stock which he or she may have held in his or her own name for at least fourteen days before the time of voting; and the persons having the greatest number of votes shall be the Directors, and if it shall happen that two or more persons shall have an equal number of votes, the Directors in office at the time of such election, shall, by a plurality of votes given by ballot, determine which of the persons so having an equal number of votes shall be Director or Directors, so as to complete the whole number chosen; and the Directors so chosen shall, as soon as may be thereafter, proceed by ballot, to elect one of their number President; and if any Director shall cease to be a stockholder, or shall resign, his office shall be vacant; and whenever any vacancy shall happen, the same

shall be filled by the remaining Directors by a plurality, for the unexpired term, except as provided in section fourth of this act.

SEC. 4. That Joseph Hoy, Alexander Ramsey, William L. Banning, Edmund Rice and Charles H. Oakes, shall be the first Directors of the said company, who shall hold their offices until one year after the said company shall be organized and in practical operation, and until others are chosen in their places, and they shall proceed to choose their President at such time and place as they, or a majority of them, shall determine. Any of the above named Directors on resigning may designate the person or persons to fill the vacancy, provided that the person or persons so designated are stockholders of said company, for the unexpired term; vacancies by death shall be filled by the remaining Directors, by a plurality, for the unexpired term.

SEC. 5. The corporation formed under this act, shall, in addition to the powers hereinbefore conferred, have power, first, to purchase and hold real estate; second, to erect and maintain all necessary and convenient buildings, fixtures and machinery for the aforesaid purposes, or incident or necessary thereto.

SEC. 6. It shall and may be lawful for the Directors, or a majority of them, to require payment of the subscription to the capital stock of said corporation, at such times and in such proportion as they, or a majority of them, shall deem fit, under the penalty of forfeiting any previous payment or payments thereon, and that previous notice of the instalments required to be paid after the first, and of the time when the same are to be paid, shall be published at least fourteen days, in two of the public newspapers printed in the City of St. Paul; provided, no such forfeiture shall be made, until the company shall be organized and in practical operation.

SEC. 7. If any person or persons wilfully do, or cause to be done, any act or acts whatever, whereby the works of the said corporation, or any pipe, conduit, plug, cock, reservoir, or any engine, machine, structure or any matter or thing appertaining to the same, shall be stopped, obstructed or impaired, weakened, injured or destroyed, the person or persons so offending

shall forfeit and pay to the said corporation treble the amount of the damage sustained by means of such offence or injury, to be recovered in the name of said corporation, with costs of suit, in any Court having cognizance thereof.

SEC. 8. The said company shall be deemed to be organized when the President shall be elected, and shall be deemed to be in practical operation from the time the contract to build the work is made.

SEC. 9. That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the Board of Directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: PROVIDED, that whenever the corporation of the City of St. Paul shall, by resolution of the Board of Aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company, an interest of eight per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing the same.

SEC. 10. That if after the expiration of twenty years from and after the first day of January, 1857, the corporation of the City of St. Paul should resolve to purchase the said gas works from the St. Paul Gas Light Company, which they hereby have a right to do, the price shall be fixed by arbitrators, one or more to be chosen by the President and

Directors of the company, and an equal number by the Board of Aldermen of said city; said arbitrators shall not be stockholders in said company nor members of said Board of Aldermen. They shall take into consideration the value of the gas works, and the lands, grounds, building, utensils, rights and interests, and everything thereunto appertaining; and if they agree and so report in writing, their award shall be binding on the parties; but if they should not agree, then the said arbitrators shall elect some creditable and disinterested person umpire between them, whose decision and award, in writing, reported to the parties above, shall be binding and conclusive; any law to the contrary notwithstanding. To the amount so agreed upon shall be added seven per centum advanced on said valuation, which amount, with the seven per centum on the same, shall be paid by the corporation of the said city to the said company in full consideration for their works, lands, ground, buildings, interests, rights, utensils, &c., belonging to to the said gas works.

SEC. 11. That in the event the said city shall decline to purchase at the end of twenty years, as provided in the preceding section, then the company shall, in like manner, at the end of twenty years from and after the first day of January, A. D. 1877, and provided the Board of Aldermen then resolve to purchase the same, sell and convey the city all their estates, interest and titles, to the said gas works in the manner as is before provided in section ten, except that to the amount of valuation then so to be agreed upon, shall be added only five per centum advanced, which amount, with the said five per centum on the same, shall be paid by the city to the company, in full of all consideration for the said gas works and their appurtenances: Provided, however, That the corporation of the city of St. Paul shall notify the President and Directors of the company of their intention to purchase at either of the times prescribed, at least six months previous to the expiration of the said terms of twenty and twenty years, respectively, and a failure to notify as herein provided, shall be deemed a refusal on the part of the city to purchase the interests of said company.

SEC. 12. The corporation of the city of St. Paul and other

corporations and companies, are hereby authorized and empowered to subscribe for any number of shares of stock in this company, and to provide for the payment of the same as may be agreed upon with the Board of Directors or their agents, and may purchase stock of any holders thereof and sell the same; and they may vote incorporate capacities by such representatives as they may prescribe by their regulations, ordinances or by-laws, and the votes of all such representatives shall be given as those of any other stockholders; subject, however, to the regulations of the company in all respect not inconsistent with the true intent and meaning of this section.

SEC. 13. The Board of Directors are hereby authorized to receive from any company, any bonds, notes, or other securities, in payment of, or as security for stock purchased or subscribed, and upon such terms as may be agreed upon, or in such manner, on such conditions and in such instalments as they may think to the interest of the company; and they may receive, on deposit or loan, and upon such terms as the parties interested may agree upon, any funds, the temporary or permanent use of which may be offered them, and the use of which may be beneficial to the company. And that for the purpose of increasing the works, extending the pipes, and furnishing a working capital for said company, from time to time, or of discharging any debts or liabilities which it has heretofore incurred or may hereafter incur in the prosecution or conduct of its business, or in the administration of its affairs, they may issue and sell the bond of the company, and secure the payment of the principal and interest of the same by mortgage upon the company's property and franchises.

SEC. 14. The corporation of the city of St. Paul and the Board of Directors of the St. Paul Gas Light Company may contract for and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon, and they may make generally such contracts in relation to the business of the company as may be beneficial to them and the public.

SEC. 15. This act shall be in force for the term of twenty-

five years from and after the first day of January, in the year of our Lord one thousand eight hundred and fifty-seven, unless the company hereby incorporated shall sell and convey within the said term of twenty years, their gas works, lands, rights and privileges, as herein provided, to the City of St. Paul; in which event said gas works, and all rights, powers and privileges hereby granted, shall be invested in the Mayor, Aldermen and citizens of St. Paul, or [in] their corporate capacity; and the said city shall have all the powers and be invested with all the rights and privileges of the individual stockholders, and also of all such as are invested in the President and Directors of said company by virtue of this act; but should the said city not resolve to purchase at either of the times provided herein, then this act shall be in full force for an additional term of ten years from and after the last date mentioned for such sale and purchase, and no longer: Provided, That this act shall be void unless said company shall construct and lay at least one and a half miles of main pipe, and shall be ready to furnish gas and fixtures to the city and citizens of St. Paul, so far as they can be conveniently supplied from said main pipes, within eighteen months from the passage hereof.*

SEC. 16. This act shall be in force from and after its passage, and shall be deemed a public act, and be favorably construed for the purposes herein expressed and declared in all Courts and places.

*Extended to December 1, 1857, by *S. L. Minn., 1857, Ch. 65, §1.*

APPENDIX B.

PORTIONS OF THE CHARTER OF THE CITY OF ST. PAUL, AS COMPILED AND PUBLISHED BY AUTHORITY OF THE COMMON COUNCIL OF THE CITY IN 1892.

(in force in 1897).

SEC. 28. "He [the Comptroller] shall at all times have access to the said reports, books, papers, vouchers and accounts, and shall assist the treasurer in carrying out the provisions of chapter five of this act All claims and demands against the city, before they are allowed by the common council, shall be audited and adjusted by the comptroller, and all orders on the treasurer shall be examined and countersigned by him before they are delivered by the city clerk." (*Sp. Laws Minn. 1874, Ch. 1, Sub. Ch. III, Sec. 13*).

* * * * * * *

SEC. 36. "The common council shall have power at any time to require other and further duties to be performed by any officer whose duties are herein prescribed, not inconsistent with this act." (*Sp. Laws Minn. 1874, Ch. 1, Sub. Ch. III, Sec. 22*).

* * * * * * *

SEC. 38. "On and after the eleventh (11th) day of May, A. D. eighteen hundred and ninety-one (1891), the legislative authority of the City of St. Paul shall consist of the assembly and board of aldermen, which meet separately, save as herein provided, for the transaction of business, at the Court House or City Hall of said city, and each of said bodies shall meet at such times as it may determine by resolution. Said two (2) bodies shall be known as the common council of the City of St. Paul." (*Sp. Laws Min. 1891, Ch. 6. Sec 1, Sub. Sec. 1*).

* * * * * * *

SECTION 40. "The Common Council shall have the management and control of the finances (subject to the provisions of this act) and all the property of the city, and shall

likewise, in addition to the power herein vested in them, have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as they shall deem expedient; * * * and all such ordinances, rules and by-laws are hereby declared to be and have the force of law. *Provided*, That they be not repugnant to the constitution and laws of the United States, or of this State; and for these purposes shall have authority by ordinances, resolutions or by-laws.

* * * * * * *

Sixth. To prevent the encumbering of streets, sidewalks, lanes, alleys, public grounds or wharves, with carriages, carts, wagons, sleighs, boxes, lumber, fire wood, posts, awnings, or other materials or substances whatever."

Eleventh. * * * To erect lamps and to provide for lighting the city, and to control the erection of gas works, or other works for lighting the city, streets, public grounds and public buildings, and to create, alter and extend the lamp districts. * * *

Thirty-first. To remove and abate any nuisance, obstruction, or encroachment upon the streets, alleys, public grounds and highways of the city." (*Sp. Laws Minn., 1874, Ch. 1. Sub. Ch. IV, Sec. 3*).

* * * * * * *

SEC. 44. "The common council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and grounds, and parks and sewers, and all other public improvements and public property within the limits of said city" (*Sp. Laws Minn., 1874, Ch. 1. Sub. Ch. IV, Sec. 7*).

* * * * * * *

SECTION 56. "All moneys belonging to said city shall be under the control of the Common Council, and shall be paid out only upon the order of the mayor and clerk, countersigned by the comptroller, duly authorized by virtue of a resolution of the

common council, two-thirds (2/3) of the whole number of each body voting therefor * * * (*Sp. Laws Minn., 1891, Ch. 6, Sec. 2, Sub. Sec 2*).

SECTION 57. * * *.

The said common council, by a three-fourths (3/4) vote of all members of each body, may levy an annual tax upon all property in said city, taxable under the laws of this State to and for the specific purposes following, that is to say: * * *

Sixth. To provide for the lighting of said city.

* * * * * *

Twenty-fourth. To provide a general fund for the current and incidental expenses of said city, not hereinbefore specified and provided for, and all money received from liquor, butcher, dog, dray, wagon, truck, express, theatre, circus and other licenses, and also all money received from the municipal court, market house and market, workhouse, building inspector's permits, poundage receipts, and from all other sources (save when received for a specified use or purpose), shall be credited and passed to the general fund.

The amount of money to be raised by taxation for the above purposes, as aforesaid, shall only be so much as will be necessary, in addition to the amount received from all other sources, for an economical administration of the affairs of said city."

(*Sp. Laws Minn. 1891, Ch. 6, Sec. 3, Sub. Sec. 3*).

* * * * * *

SEC. 61. "It shall be the duty of the comptroller of said city, in auditing and adjusting claims and accounts, as in the charter of said city provided, to designate and specify upon each claim, demand and account so audited and adjusted the particular fund or account, as said fund or account is shown by the last tax estimate and the tax levy when made based thereon, out of which the same shall be paid; and no claim, demand or account shall be audited or adjusted by him, or reported to the council, until there shall be sufficient money in the treasury to the credit of the particular fund or account, out of which the same is payable, to pay the same, as well as other unpaid claims before that time audited and allowed

against such fund" (*Sp. Laws Minn. 1891, Ch. 6, Sec. 3, Sub. Sec. 7*).

* * * * * *

SEC. 64. "The common council of said city shall have no power or authority to allow or authorize the payment of any claim or demand against the said city, or to authorize the appropriation of any money of said city in behalf of said city, unless sufficient money out of which to satisfy said claim, appropriation or demand, and applicable thereto, is actually in the treasury of said city, or has been embraced in a then existing and uncollected tax estimate or levy; *provided however*, that this provision shall not apply to a contract for the satisfaction of which a local assessment is to be made.

No ordinance, order or resolution of said council appropriating money or requiring the payment or expenditure of money by said city, and no contract requiring the payment of money by said city, shall be operative or valid unless there is specified therein the particular fund out of which the same is to be paid" (*Sp. Laws Minn. 1891, Ch. 6, Sec. 3, Sub. Div. 10*).

* * * * * *

SEC. 609. "When any suit or action shall be commenced against said city, the service thereof may be had by leaving a copy of the process, by the proper officer, with the mayor; and it shall be the duty of the mayor forthwith to inform the city attorney thereof, who shall take such other proceedings as by the ordinances or resolutions of said council may be in such case provided, or as may be needful in the matter (*Sp. Laws Minn. 1874, Ch. I, Sub. Ch. XII, Section 7*).

* * * * * *

SEC. 624 * * * "All printed compilations of the laws and ordinances of the city, and all printed publications of the proceedings of the common council or of the board of public works, or any of the officers of said city, if published or purporting to be published, compiled or revised by or under the authority of the said city or any of its officers, shall be admissible in all courts of law, and on all other occasions in this state as evidence of such laws, ordinances and proceedings" (*Sp. Laws Minn., 1874, Ch. I, Sub. Ch. XII, Section 22*).

No. 183.

Office Supreme Court U.S.
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Clerk.

Brf. of Markham for D. C.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Jan. 28, 1901.

No. 183.

THE ST. PAUL GAS LIGHT COMPANY,
Plaintiff in Error.

vs.

THE CITY OF ST. PAUL,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JAMES E. MARKHAM,
Counsel for Defendant in Error,
St. Paul, Minnesota.

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE ST. PAUL GAS LIGHT COMPANY,
Plaintiff in Error.

vs.

THE CITY OF ST. PAUL,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

This cause is brought into this court upon a writ of error to the Supreme Court of the State of Minnesota, the plaintiff in error asking for a review and reversal of the final judgment rendered in that court in favor of the defendant and against the plaintiff, on the twelfth day of December, 1899. The action was brought in the District Court of the

State of Minnesota to recover the sum of $1426.46, with interest, claimed to be due from the defendant to the plaintiff, as interest upon the original cost of certain street lamps and lamp posts furnished and put up by the company in the streets of the city of St. Paul, at the instance and request of the city, under the provisions of section 9, chapter LIII, Special Laws of Minnesota, 1856, being an act of the legislature of the territory of Minnesota, entitled, "An act to incorporate the St. Paul Gas Light Company," approved March 1, 1856.

The cause was tried before the court without a jury, and thereafter the court made and filed its decision containing its findings of fact and conclusions of law, and directing judgment in favor of the plaintiff for the amount claimed in its complaint, with interest and costs. (Transcript, Fol. 56-71). Judgment was entered in accordance with this direction, from which the defendant appealed to the Supreme Court of the State. That court, on November 14, 1899, made and filed its decision, holding that the plaintiff was not entitled to recover, reversing the judgment of the district court, and directing judgment to be entered in favor of the defendant. (Transcript, Fol. 76-81). Thereupon judgment was duly entered in the Supreme Court of the State of Minnesota, on the twelfth day of December, 1899, reversing the judgment of the court below and adjudging that the plaintiff take nothing by its action against the defendant and that the defendant go hence without day, and have and recover of the plaintiff its costs and disburse-

ments, amounting to $59.58, with execution to enforce the same.

It is not claimed by the plaintiff that it has any contract with the defendant city, obligating the latter to pay interest upon the original cost of these street lamps, lamp posts and their connections, except as the legislative act of 1856, above referred to, and the acts of the defendant thereunder, in directing the plaintiff by resolution of its common council, to erect and light gas lamps in the streets of the defendant, and the action of the plaintiff, in obedience to such orders, in providing, setting up and maintaining such lamps and their connections, operated as a contract between the plaintiff company and the defendant city. Brief reference will be made to the provisions of this act. By the first section thereof, certain parties therein mentioned are created and constituted a body corporate by the name of the St. Paul Gas Light Company, with full power and authority, at any time thereafter, to manufacture, make and sell gas to be used for the purpose of lighting the city of St. Paul and the streets, avenues, lanes, alleys and squares thereof, and any building, manufactories or houses therein contained, and attempts to grant to the company the exclusive right to lay pipes for the purpose of conducting gas in any of the streets, avenues, lanes, alleys and squares of the city, and to adopt any other necessary means to furnish gas to the inhabitants of said city.

By section 9 of the act, it is made the duty of the corporation to prosecute the work necessary to

lighting the whole city and suburbs with gas and to lay their pipes in every and all directions whenever the board of directors shall be satisfied that the expense thereof shall be counterbalanced by the income accruing from the sales of gas, and it is provided:

"That whenever the corporation of the City of St. Paul shall, by resolution of the Board of Aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cent per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same, but said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing same."

Section 10 of the act contains provisions for an appraisal of the property and the purchase thereof by the city, at its option, after the expiration of twenty years from the first day of January, 1857.

By Section 11 it is provided, that in the event the city shall decline to purchase at the end of the twenty year period mentioned in Section 10, the city shall again have the right to make such purchase at the end of twenty years from and after the first day of January, 1877, upon certain conditions

as to valuation and payment therein specified.

By section 14 of the act, it is provided that

"The corporation of the City of St. Paul and the board of directors of the St. Paul Gas Light Company, may contract for and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon, and they may make generally such contracts in relation to the business of the company as may be beneficial to them and the public."

By section 15, it is provided that the act shall be in force for twenty-five years from the first day of January, 1857, unless the company shall sell and convey within said term of twenty years, their plant and property to the city, in which case the privileges granted by the act shall be vested in the mayor, aldermen and citizens of the city in their corporate capacity. But it is provided that if the city shall not resolve to purchase at either of the times specified, then the act shall be in force for an additional term of ten years from and after the last date mentioned, for such sale and purchase, and no longer.

It is conceded that the city has at no time availed itself of its right to purchase the plant of the company and succeed to its rights under the provisions of the act. It is also conceded that after the passage of the act of March 1, 1856, the plaintiff accepted the same and did perform the various acts and things therein required to be performed by it as conditions to the vesting in it of the powers, rights and privileges thereby conferred.

The trial court found that in order to do so, the

plaintiff has constructed extensive gas works and laid mains and gas pipes in many of the streets of the city, and has invested large sums of money in the construction of its works and in the laying of its gas pipes and mains and in other ways incident to its business, and that, at various times heretofore subsequently to the performance by the plaintiff of the conditions named in the act, i. e. subsequent to the year 1857 and prior to January 1, 1897, the City of St. Paul, from time to time, by resolution of its board of aldermen and its common council, directed lamps and lamp posts to be erected and lighted by the plaintiff in the streets of the city of St. Paul, to the aggregate number of 3362, and that in every such case the plaintiff has furnished, provided, laid, set up and kept in good repair, at its own proper expense and charge, all such street lamps and posts and the pipes and meters connected with, necessary to supply the same, and that since the installation of each of said lamps, the company, except as otherwise found by the court, has supplied the same with illuminating gas and kept them lighted nightly, under express contract or contracts with the city, at a price per lamp, per year, and for a period specified in each of said contracts. (Transcript Fol. 59).

The court also found that on March 14, 1896, the plaintiff and the defendant entered into a written contract for the furnishing of the necessary gas and lighting the streets of the city for a period of one year from April 1, 1896, and a complete copy of this contract is annexed to the decision of the

court as "Exhibit A" thereof, and is found on pages 28 to 31 inclusive of the transcript of record in this court.

The court further found that the specifications recited in this contract contained the following provision, which is the only provision in said specifications in any way material to the issue between the parties to this action, to-wit:

"The district to be covered by gas lighting includes all the streets in the territory now lighted by gas. The number of gas lights now in service and to be lighted and maintained until otherwise ordered, is 3031. The right however, is reserved to said city to decrease, from time to time, the number of lamps in service, and to discontinue the lighting by gas of the whole or any portion of any street or particular number of streets, of any particular section of said city, and from and after service by said city upon said contractor of written notice of the discontinuance of any such lamp or lamps, the contractor shall not be entitled to any compensation for the further lighting of the lamp or lamps so ordered discontinued."

The court also found that on the sixteenth day of March, 1897, the plaintiff and defendant entered into a further written contract for the furnishing of gas and lighting said street lamps for the period of nine months from and after the first day of April, 1897, at a stipulated price for each lamp, and that the specifications incorporated into this contract contained the same provisions as to the district to be covered by gas lighting, the number of lamps in service and the discontinuing of lamps and the lighting thereof, as was contained in the contract of March 14, 1896, herein above refered to,

and also contained the following provision:

"It is also expressly understood and agreed that none of the terms or provisions of this contract are to be construed to waive or modify in any way the claim of said company, that said city of St. Paul is under obligation to pay to said St. Paul Gas Light Company interest at the rate of eight per cent per annum, payable quarterly, upon the original cost of the street lamps, lamp posts, gas meters, gas pipes and the cost of erecting and laying the same at any time provided by said St. Paul Gas Light Company, at the request or order of said city of St. Paul, under the provisions of section 9 of the act of the legislature of the said State of Minnesota, constituting the charter of said St. Paul Gas Light Company, it being understood that neither party to this contract, by the execution thereof, waives any of its rights or claims in reference thereto." (Transcript Fol. 60-61).

The court further found that prior to the first day of January, 1897, the defendant under the provisions of the contract of March 14, 1896, directed the plaintiff to cease to light 672 of the street lamps then in service, and terminated,as to said 672 lamps so ordered discontinued, the contract between the plaintiff and the defendant, under which the plaintiff had theretofore supplied gas thereto and lighted the same, and plaintiff thereupon ceased to light said 672 lamps and defendant ceased to pay for the supply of gas thereto or the lighting thereof. And that between January 1, 1897, and December 31, 1897, inclusive, the plaintiff supplied gas to and lighted, under contract between the plaintiff and the defendant, only 2690 of the said 3362 street lamps, while 672 of said lamps remained, during the said period, out of service, idle and unused, and

the parties have made no further contract for the lighting thereof. (Transcript Fol. 61-62).

The court also found that the original cost to the plaintiff of the purchase and erection of the 3362 street lamps and posts, and appliances connected therewith, put in by the company at the request of the city, at various times between the first day of January, 1857, and the first day of January, 1897, was $85,539.53, and that the sum of the original cost of said 672 discontinued lamps and the erection thereof, and of the purchase and laying of the service pipes connected therewith, was $17,830.75.

The court found that the defendant had paid to the plaintiff interest at the rate of eight per cent per annum upon the original cost of each of said 3362 street lamps and the service pipes connected therewith, for the whole period lapsing between the period of the erection and laying of such lamps and service pipes and the first day of January, 1897, and has since continued to pay interest upon the original cost of all of said lamps and service pipes, except 672, of them which were discontinued, as aforesaid. (Transcript Fol. 62).

The court also found that on the first day of July, 1897, or immediately thereafter, the plaintiff demanded of the defendant the payment of interest for the six months next preceding said day, at the rate of eight per cent per annum, upon the cost of 3362 street lamps and posts, erected by the plaintiff prior to January 1, 1897, and thereafter, and on the first day of January, 1898, or immediately thereafter, plaintiff demanded of de-

fendant payment of interest for the period of six months next preceding the said day, at the same rate, upon the original cost of all said street lamps and posts. The city, a short time after these respective demands, paid to the company interest at the rate of eight per cent per annum upon the 2690 of said street lamps then actually in service, but declined and refused to pay any interest whatever on account of the original cost of construction of the 672 of said street lamps, the lighting of which was discontinued on and prior to the first day of January, 1897, under the provisions of the contract of March 14, 1896, above referred to, the city insisting that it was under no obligation to pay interest upon the cost of unused and dismantled gas posts which the company was not required or permitted to keep lighted or in service under the provisions of the contracts of March 14, 1896, and March 16, 1897, between the city and the company, herein above referred to.

The city authorities, desiring that these unused and dismantled posts should be removed from the streets of the city, on August 20, 1897, by action of its common council adopted the following resolution:

"Resolved, that the St. Paul Gas Light Company be, and the same is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light, under contract with said company, and which said lamps have been discontinued by order of the board of public works. Resolved further, that the board of public works is hereby required to transmit to the city comptroller a statement, showing the number

and location of said gas street lamp posts not now in service in such electric light district above referred to, and that from and after the passage of this resolution, no interest be paid by the City of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts."

The plaintiff insists that the provisions of section 9 of the act adopted by the legislature of the territory of Minnesota on the first day of March, 1856, together with the action of the defendant in requesting and directing from time to time that the company erect and put up street lamps in the various streets of the city, constitute an irrevocable contract, between the city and the company obligating the city to pay interest at the rate of eight per cent per annum upon the cost of each one of the lamps and posts so put in from the time of the erection thereof until the expiration of the life of the corporation, which will be on the first day of January, 1907. And it is claimed that the resolution adopted by the common council of the city of St. Paul, directing that the dismantled and unused lamps, standing at various places in the streets of the city, in the district now lighted by electric light, under contract with this same company, should be removed, and that no further interest should be paid on account of the cost of the construction of these street lamps and posts, is in effect a law of the State of Minnesota impairing the obligation of the plaintiff's said contract, and that by the adoption of this resolution, the defendant has undertaken to deprive the plaintiff of its property with-

out due process of law and without just compensation, and that this is in violation of certain provisions of the federal constitution to which reference is made in the writ of error.

ARGUMENT.

I.

It is respectfully submitted that upon the record in the case at bar, this court has no jurisdiction of a writ of error to review the final judgment of the supreme court of the state of Minnesota. The action, as we have seen, was brought in the state court to recover a sum of money claimed by the plaintiff to be due from the defendant as interest upon the original cost of certain street lamp posts, and their connections, erected by the plaintiff at the instance of the defendant, in the streets of the city of St. Paul. The asserted right of the plaintiff to receive interest upon the original cost of these lamp posts and connections, is based wholly upon the provisions found in section 9 of the legislative act constituting the charter of the company. It may be conceded that the act of 1856, granting to the plaintiff the right to lay its pipes and mains in the streets of the defendant city, and to supply gas to the municipality and its inhabitants, is the grant of a franchise vested in the state, and that it, together with the performance by the grantee, of the conditions and obligations imposed upon it thereunder, constitutes a contract between the parties, and that this

contract is protected by the constitution of the United States against subsequent state legislation to impair it. But the sole question passed upon by the court below, and upon which its judgment was rested, was whether upon a proper construction of the language contained in the act, the city by ordering the company to put in the necessary lamps and posts and to light the streets of the city thereunder became obligated to pay interest upon the original cost of construction of the street lamps and posts ordered in, from time to time, by the city authorities, during a period commensurate with the life of the corporation itself, or only for such period as these lamps should be in service, lighted and maintained under contract between the company and the city. The state court held the latter to be "the more reasonable and proper construction of the provision of the charter, and the one which should be adopted. We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to use. We, therefore, hold that the city is not liable for such compensation for street lamps, after it has ceased to use the same and abandoned the use of gas in lighting its streets." (Opinion Canty, J., Fol. 80 Transcript).

There is not a word in the opinion upon the subject of the resolution adopted by the defendant's council on August 20, 1897, directing these disused and dismantled posts to be removed from the streets of the city, directing the board of public

works to certify to the city comptroller the number of lamps out of service and directing, in substance and effect, that thereafter the city comptroller should not audit or allow any claims on the part of the company for interest upon the original cost of the lamps and posts so removed.

The learned counsel for the plaintiff in error assumes to give to this simple resolution the force and effect of a legislative act of the state, and contends that the effect thereof, if it is not declared invalid and ineffectual, is to impair the obligation of the contract between the plaintiff in error and the defendant city. No one, except the learned counsel, has ever contended that the resolution has, or was intended to have, any such effect. The resolution, so far as it directs the removal of the dis-used and dismantled posts, was a proper exercise of the police power, granted to the city under the provisions of its charter, which vests in the common council the care, supervision and control of all public highways, bridges, streets, alleys, public squares, grounds, parks, sewers and other public improvements and property within the limits of the city. The gas company claimed the right to receive interest upon the original cost of putting in these lamp posts and their fixtures, notwithstanding the fact that the district in which they are located was lighted by electric light under a separate contract, and notwithstanding the fact that these lamp posts were no longer required, and that they had been eliminated from the written contract between the company and the city, providing

for the lighting of other portions of the city with gas for a period specified in the contract. The city denied this claim, and by action of its common council indicated its construction of section 9 of the company's charter, and in accordance with such construction, indicated its intention to refuse further payment of interest on the cost of the posts so ordered out. Payment was refused and the gas company brought suit. The trial court, construing the act of March 1, 1856, held that the defendant was under obligation to pay to the plaintiff quarterly, during the term for which the act shall remain in force, to-wit, to and including the thirty-first day of December, 1906,interest at the rate of eight per cent per annum, upon the cost of the entire 3362 street lamps ordered into service from time to time, between the date of the passage of the act and the first day of January, 1897, without regard to the question whether such lamps were in service under contract or were out of service and abandoned. (Fol. 64 Transcript). Based upon this single conclusion of law, judgment was entered in favor of the plaintiff for the amount unpaid. The court did not in any manner pass upon the effect of the resolution of August 20, 1897. It was not in issue in any manner. Nothing was claimed for it. An appeal was taken from this judgment to the supreme court of the state where the judgment of the trial court, based on its construction of the plaintiff's charter, was reversed. The appellate court sustained the defendant's contention that the company's charter does not re-

quire the city to pay interest upon the original cost of street lamps which it is not under any contract to use, and is not liable for such compensation after it has ceased the use of the same and abandoned the use of gas in lighting its streets. (Fol. 80 Transcript). The decision of the trial court and the decision of the appellate court as well, was confined solely to the question of the proper construction of the provisions contained in the gas company's charter. The record nowhere discloses that the court gave any force or effect to the resolution adopted by the city council. The resolution could not in any way affect the plaintiff's right to recover interest on the cost of these posts if it was entitled thereto under the provisions of its charter. No such effect was ever claimed for it and no such force was attributed to it by the court below. The defendant did not set up the resolution as a defense to the plaintiff's claim or in any way attempt to justify its refusal to pay by reason of its adoption. The court has not by its judgment or otherwise attempted to give it the force and effect sought to be given it by counsel for the plaintiff in error, in order to confer jurisdiction upon this court to review the judgment rendered by the highest court of the state denying plaintiff's asserted right to receive interest upon these abandoned posts. It is true there is in the record a certificate made by the chief justice of the supreme court of the state of Minnesota, on December 28, 1899, the day upon which the writ of eror to this court was allowed, to the effect that upon the argument there was drawn in ques-

tion the validity of this resolution and of the statutes of the state, authorizing the adoption of the same on the ground that the same were laws of the state of Minnesota repugnant to section 10 of article I of the constitution of the United States, and that the decision of the court was in favor of its validity.

The certificate of the presiding judge of the state court, as to the existence of grounds upon which the interposition of this court might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

Sayward v. Denny, 158 U. S. 180.

It must appear from the record itself, by clear and necessary intendment, that the Federal question was directly involved, so that the state court could not have given judgment without deciding it; that is a definite issue as to the possession of the right must be distinctly deducible from the record, before the state court can be held to have disposed of such Federal question by its decision.

Powell v. Brunswick Co., 150 U. S. 400, 433.

In order to come within the provisions of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state and not at the decision of its courts, or the acts

adminisrtive or executive boards or officers, or the doings of corporations or individuals.

New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 39.

In the case just cited, the various decisions of this court upon the question of the jurisdiction of the court to re-examine the judgment of the highest court of a state on the ground that the obligation of a contract has been impaired by a law of the state, which has been given force and effect by the judgment of the state court, are fully reviewed and considered. The court, on page 38 of the opinion, says: "The result of the authorities, applying to cases of contracts the settled rules, that in order to give this court jurisdiction of a writ of error to a state court, a Federal question must have been expressly or in effect decided by that court, and therefore, that when the record shows that a Federal question and another question were presented to that court, and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed and the state court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment; so, when the state court upholds the subsequent law on the ground that the contract did not confer the righ claimed, this court may inquire whether the

supposed contract did give the right, because if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been pased, and this court has no jurisdiction."

It would seem to be clear that the case at bar is controlled by the first and fifth of these rules. Here the state court, by its judgment, has decided against the right claimed by the plaintiff in error, to recover for interest upon these disused lamps and posts, not because of any law of the state amending or modifying the original contract between the parties, but because the contract, when properly construed, does not impose upon the defendant the obligation to make such payment. Again, within the fifth rule, the state court has given no effect to the resolution, claimed by the plaintiff to be a subsequent law of the state, but has decided on grounds independent of that law, that the right claimed was not conferred by the contract, and therefore the case stands just as if the resolution had not been passed, and this court is without jurisdiction.

It is true that any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the state court. Williams v. Bruffy, 96 U. S. 176. It was said by this court, in New Orleans Water Works Co. v. Louisiana Sugar Co., 96 U. S., at page

31 of the opinion, that "A by-law or ordinance of a municipal corporation *may be* such an exercise of legislative power delegated by the legislature to the corporation as a municipal subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the constitution of the United States." In support of this declaration, the court cites United States v. New Orleans, 98 U. S. 381; Merriwether v. Garrett, 102 U. S. 472; Murray v. Charleston, 96 U .S. 432, and Home Insurance Co. v. City Council of Augusta, 93 U. S. 116. In each of these cases the ordinance under consideration was adopted in the exercise of the power of determining what persons and property should be taxed, and this power, it was said, belongs exclusively to the legislative branch of the government, and whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power.

In adopting the ordinance in question, directing these disused lamp posts to be removed, and directing that no interest should be paid upon the original cost of the lamps so removed, the city was not acting in the exercise of any legislative power conferred upon it by the state.

Under the provisions of the act of the legislature of the state of Minnesota, constituting the charter of the city of St. Paul (Sec. 3, Chapter 1, Special Laws, 1874) the common council of the city is vested with certain legislative powers. It is provided

that "The Common Council shall have the management and control of the finances (subject to the provisions of this act) and all the property of the city, and shall likewise, in addition to the powers herein vested in them, have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as they shall deem expedient. * * * The Common Council shall have full power and authority to declare and impose penalties and punishment and to enforce the same, against any person or persons who may violate any of the provisions of the ordinance, rule or by-law passed or ordained by them; and all such ordinances, rules and by-laws are hereby declared to be and have the force of law, provided that they be not repugnant to the constitution and laws of the United States or of this state; and for these purposes shall have authority by ordinances, resolutions or by-laws, 1st. To regulate the exhibition of common show-men and shows of all kinds. * * * 2nd. To restrain and prohibit all description of gaming and fraudulent devices. 3rd. To prevent riots, noise, disturbance and disorderly assemblages in said city." Then follows an enumeration of the various subjects upon which power to legislate is given, forty-one in all, relating to the exercise of the usual police powers of municipalities and including also the grant of authority to levy taxes for the support of the city

government. The legislature has not, in any manner, delegated to the common council of the city of St. Paul, any general power to legislate for the people of the city, or to pass laws upon any subject, except those specifically enumerated in the charter. It will be seen that by express provision of the charter, the legislative power of the common council is confined to enactment of ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, and it is only the ordinances, rules and by-laws enacted for these purposes, that are by the legislative act declared to be and to have the force of law. The resolution under consideration here amounted simply to a declaration of the construction placed by the city authorities upon a provision of the gas company's charter, to which reference has been made, and a denial of any obligation upon the part of the city, to pay interest upon the original cost of the posts ordered to be removed. The resolution could not have the force or effect of a law of a state. The common council, by the adoption of an ordinance or resolution, could not in any way modify or amend the provisions of the legislative act constituting the charter of the gas company, and the council did not assume to do so. It merely spread upon its records a declaration of its contention that the act of 1856, when properly construed, did not impose upon the city the obligation to pay interest upon the original cost of the gas posts and of lamps no longer in service, and which had been discon-

tinued under the provisions of the existing contract between the company and the city. See New Orleans Water Works Co. v. Louisiana Sugar Co., 125 U. S. 18, 39; Railroad Co. v. Ellerman, 105 U. S. 166, 172; Day v. Green, 4 Cush. 433, 438.

The state court, by its decision and judgment, did not assume to hold that the city of St. Paul, by ordinance or by resolution of its common council, could amend or modify the existing contract between the gas company and the city, growing out of the enactment of the legislative act of March 1, 1856, and the acceptance thereof by the grantee and by the city. The court did not hold the resolution to be a law of the state and did not hold that the resolution stood in the way of the enforcement of any right conferred upon the gas company by the act of 1856. In fact the force and effect of that resolution as a law was never passed upon, either by the trial court or by the supreme court of the state. Nothing was ever claimed for the resolution except as a denial of liability and an indication of the refusal of the city to pay, because upon its construction of the contract it was not liable for such payment. In order to give this court jurisdiction to re-examine the judgment of the state court, it must appear from the record in effect, that but for the pasage of this resolution the company would be entitled to recover, but that the court gave force and effect to the resolution, to defeat such right of recovery.

It may be that if this court had been called upon in the first instance, to construe the act of 1856, it

would have placed a different construction upon section 9 than that placed upon it by the state court. But this court is "not authorized by the Judiciary Act, to review the judgment of the state courts because their judgment refuses to give effect to valid contracts, or because those judgments, in their effects, impair the obligations of contracts. If we did, every case decided in the state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of the obligation to what he held. Miller vs. Knox, 12 Wall. 379; Land Company vs. Laidley, 159 U. S. 103; Bacon vs. Texas, 163 U. S. 207."

In Land Company vs. Laidley, supra, this court said:

"In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by decision of its judiciary department only. The appellate jurisdiction of this court upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature, alleged to be repugnant to the constitution of the United States, has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court."

It is respectfully submitted that the writ of error should be dismissed.

II.

If this court shall hold that it has jurisdiction to re-examine the judgment of the supreme court of the state of Minnesota, then the second question arising upon the record is as to the correctness of the construction placed upon the act of 1856 by the state court. It will be observed that the act of 1856, constituting the charter of the gas company, confers upon the company the absolute and exclusive right to lay gas mains, and furnish a supply of illuminating gas for the city of St. Paul and its inhabitants, for a period of fifty years from the first day of January, 1857. The exclusive right here granted has the effect of shutting out and debarring any other person or corporation from furnishing illuminating gas to the city or its inhabitants. (11 A. & E. Enc'y. Law, 579). If the city wants its streets lighted by gas, it must enter into a contract with this company. As held by the court below, the charter provides no way in which the city can procure gas to light its streets except that provided by section 14, under which the city must make a contract voluntarily entered into by both parties. It is true, that by section 9 of the act, it is provided that whenever the city, by resolution of its board of aldermen, directs "lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and provide, lay, set up and keep in good repair, at their own expense and charge, the street posts and lamps and their pipes and meters." This provision makes it

obligatory upon the gas company to "make contract" whenever the city, by its board of aldermen, directs its streets to be lighted by gas, provided that the sale of gas in the section of the city so directed to be lighted, will be sufficient to defray the expense of furnishing the same. The city and the company are given authority, by section 14 of the act, to make such contracts as may be beneficial to the company, the city, and its inhabitants. The period for which the contract is to be made, the price of gas per thousand feet, or per lamp per year, the number of hours in each day during which the lamps are to be lighted, and all of the details of the contract, with one exception, are left to the determination of the contracting parties. The single exception relates to the furnishing of the lamps, lamp posts and connections. This one element of the contract is determined by the act itself. The company is required to furnish these necessary fixtures and the city, in consideration thereof, is required to pay interest upon the cost of this equipment at the rate of eight per cent per annum. The act is silent upon the question as to the term for which the contract is to be made; the time for which the interest payment is to be made is not prescribed by the terms of the act. It seems clear that these are matters left to be determined by mutual agreement between the parties.

The court should not hold, as contended by counsel for plaintiff in error, that the legislature intended that before the city should be enabled to light its streets with gas for any period of time, however

short, it should be obliged to incur an obligation to continue the payment of interest upon the cost of the necessary fixtures for a period of fifty years, unless the language of the act is so clear as to admit of no other construction. The court below denied that this was the necessary or proper construction to be placed upon the language contained in section 9 of the act. The court said:

"It seems to us that it would be unreasonable to hold that if, at the inception of the fifty years which this charter was to run, the city had ordered such street lamps to be erected, had used them ten years under a contract for lighting the streets, which expired at the end of that time, and then on account of some such contingency has ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, conecting pipes and meters, for forty years more, and to permit them to encumber the streets for that length of time, although the city had not a particle of use for such street lamps during all that time."

The court further held that under the provisions of section 9, the city did not have the right, in its discretion, to compel the erection of street lamps regardless of how long the city might use them, and without protecting the gas company by stipulating a reasonable length of time during which the city should use them. It was held that the gas company was under obligation to enter into a contract with the city, but that in making such contract the company could abundantly protect itself by insisting that the contract should cover a period of time of sufficient length, so that the interest, at the rate of eight per cent per annum, to be paid during that

time, would be sufficient to remunerate the company for the necessary outlay. (Transcript, Fols. 78, 80). This construction of the act is entirely reasonable and is just and fair to both parties. The time for which the contract to be made between the parties was to run, the cost of furnishing the gas, the cost of putting in these necessary fixtures, were all matters which might be taken into consideration in fixing the total contract price. Assuming such a contract for a period of twelve years, which would not ordinarily be considered an unreasonable time, it is obvious that the company would receive back the entire cost of putting in the posts, in addition to the sum paid for furnishing the gas and lighting the lamps, and would still own the posts and connections. The city not only had no "power under the charter to compel the streets to be lighted, except by making for that purpose a contract voluntary as to both parties," as determined by the court below (Transcript, Fol. 79), but it was not required to lay its pipes at all in localities where the proceeds from the sale of gas would be insufficient to defray the expense of putting in and furnishing the same. But, when the company was ordered to put in its mains, and put up street lamps and connections, in a locality where the proceeds derived from the sale of gas would be sufficient to defray the expense, then the company was bound to enter into a contract with the city, and to provide and put up the necessary gas fixtures for the purpose of lighting such streets, the necessary gas and the labor of lighting and extinguishing the

lights and keeping the lamps in proper condition, to be supplied at a reasonable price to be agreed upon between the city and the company. To avoid question as to whether the city or the company should defray the cost of putting in the posts and connections, which may be termed the "gas fixtures," the act provided that this should be done at the expense of the company, but that the city should pay interest upon the outlay at the rate of eight per cent per annum during the life of the contract.

It is to be borne in mind that the asserted right of the company to receive interest upon the original cost of these street lamps and their connections, rests wholly upon the legislative act of 1856 above referred to. The construction claimed by counsel for the plaintiff in error, would render the provisions of that act unreasonable and burdensome. It should not be given such construction unless the language clearly, and without uncertainty, requires it. The company was granted a valuable franchise, exclusive in its character, authorizing the company to lay and maintain its mains and pipes in the streets of the city, including the exclusive right to supply gas to the city and its inhabitants for a period of fifty years, and this without any compensation whatever. The usual rule of construction applicable to such grant of power, to claims of right or immunity asserted under it, is that

"Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but

what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim."

Fertilizing Company v. Hyde Park, 97 U. S. 666.

Ambiguous words in a charter or franchise must be construed most strongly against the corporation. They are to be strictly construed and nothing allowed by implication.

Water Works Company v. San Francisco, 52 Cal. 111.

It is a reasonable presumption that the state has granted in clear and unmistakable terms, all that it has intended to grant. In case of ambiguity, the doubt is to be resolved against the asserted right or immunity.

Cooley on Taxation, 209.

In order to sustain the defendant's contention and construe this act in accordance therewith, it becomes necessary to read into the act providing for the payment of these interest charges, the words "from the date of the furnishing of the same respectively to the date of the expiration of plaintiff's charter"; the language employed by counsel in the petition for writ of error herein. (Transcript, Fol. 2). It is respectfully submitted that it is quite as reasonable to read into the act the words "during the period for which such contract shall be made," thereby placing some reasonable restriction upon the period for which interest is to

be paid upon the cost of putting in these posts and their connections. But, as we have seen, it is not necessary, in order to support the defendant's contention, and in order to support the conclusion reached by the court below, to read any words into the act, for inasmuch as no term is prescribed in the act itself for which these interest charges are to continue, the right to recover interest during the charter life of the company, is not given in unmistakable terms or by necessary implication. The affirmative is not shown. Silence is negation, and doubt is fatal to the plaintiff's claim.

III.

It was argued by counsel for the plaintiff in error, in the court below, that the parties themselves, by their conduct and dealings, had placed a practical construction upon the provision contained in section 9 of the act of 1856, relating to the payment of these interest charges. It was urged that in many of the contracts made between the parties from time to time, after the passage of the act, down to the year 1897, there was inserted in the contract a recital to the effect that the city is under obligation to pay to the company interest upon the original cost of the street lamps, lamp posts, gas meters, gas pipes, and the cost of erecting and laying the same at any time provided by the company for the service of the city, at its request and upon its order, and counsel argued that the city should be estopped to deny the correctness of what was said to be a practical construction of

the provisions of this section, in accordance with the plaintiff's contention. This claim may be renewed in the argument before this court. The court below, upon full argument upon the record before it, held this claim to be untenable. (Transcript, Fol. 80). This ruling was entirely correct. No provision was made in these various contracts for the payment of interest upon the gas lamps, posts and connections then in service and required thereby to be maintained and lighted with gas. Each of the contracts provided for the payment of a fixed amount per lamp, per annum, for the necessary gas and the lighting thereof, during the period covered by such contract, and the recital in question was intended to indicate that in addition to this amount the company should have the right to receive, and the city should pay interest upon the cost of the lamps and posts in service during such period.

If this court, upon an examination of the record, reaches the conclusion that the resolution adopted by the common council of the city of St. Paul on August 20, 1897, is a law of the state of Minnesota, and that the court below gave force and effect to it as a law of the state, whereby the contract rights of the plaintiff in error are claimed to be impaired, then this court, as it has frequently held, has the right, and it becomes its duty, to examine the act creating the asserted contract right and to decide for itself independently of the adjudication of the court below whether or not the language of the act is expressive of the contract right asserted

by the plaintiff in error. But, I assume that this court will not take jurisdiction for the purpose of passing upon the question whether the parties, by their conduct and course of dealing, have or have not given to the act a practical construction in accordance with that claimed by the plaintiff in error. Nor will this court undertake to determine upon considerations not appearing upon the face of the act itself whether the city should be held estopped to deny the correctness of such construction.

It is respectfully submitted that unless the construction placed upon this legislative enactment by the highest court of the state enacting it, is palpably erroneous, the decision of that court should be followed here. I submit, in all confidence, that the conclusion and the judgment of the state court are correct and in accordance with right and justice, and that if this court has jurisdiction to reexamine the judgment, it should be affirmed.

JAMES E. MARKHAM,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 183.—October Term, 1900.

The St. Paul Gas Light Company, Plaintiff in Error, *vs.* The City of St. Paul.	In error to the Supreme Court of the State of Minnesota.

[April 15, 1901.]

The charter of the St. Paul Gas Light Company was granted in 1856, and it expires in 1907. The corporation was empowered to construct a plant to supply the city of St. Paul and its inhabitants with illuminating gas. It may be assumed, for the purposes of the question arising on this record, that the corporation discharged its duties properly under its charter, and that from the time the charter became operative the company has lighted the city in accordance with the contracts made for that purpose from time to time with the municipal authorities. The charter did not purport to engage permanently with the company for lighting the city, but provided for agreements to be entered into on that subject with the city for successive periods, and from the beginning of the charter the parties did so stipulate for a specified time, a new contract supervening upon the termination of an expired one. It may also be assumed for the purposes of this case that the rights which the corporation asserts on this record were not foreclosed by any of the contracts which it made, at different periods, with the city. The question which here arises concerns only section 9 of the charter, which is as follows:

"Sec. 9. That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: Provided, That whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cent. per annum on the amount of the sum of the original cost of said

street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing the same."

Under the foregoing section the gas company, by direction of the city, constructed street lamps, and up to January 1, 1897, they numbered 3,362. The interest on the cost of these lamps, at the rate fixed by section 9, was regularly paid by the city up to January 1, 1897. About, or shortly after that date, in certain portions of the city, the use of electricity for lighting the streets was by direction of the municipality substituted for gas, and hence the street gas lamps in those portions of the city which were lighted by electricity were no longer used. It is fairly to be deduced from the record that either by its original charter or by amendments thereto the gas company was empowered to supply electricity as well as gas, and in virtue of this power it constructed an electrical plant and contracted with the city to supply the electric lights in those portions of the city where the use of gas had been dispensed with. The gas company asserted its right to recover from the city the interest on the cost of placing in position the lamps, the use of which had been discontinued under the circumstances just above stated. The city denied its obligation to pay interest on account of the cost of these lamps. As the result of this disagreement the city, in 1897, passed the following ordinance:

"Resolved, That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works.

"Resolved, further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts not now in service in said electric light district above referred to, and that from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts."

Thereupon the gas company commenced this suit to recover the interest on the cost of the construction of the lamps referred to in the ordinance. Without going into unnecessary detail it is adequate to say that the complaint alleged that the city was obliged by section 9 of the charter of the company to pay the interest on the cost of the lamps, although they were no longer in use for lighting purposes. The ordinance of the city which we have reproduced was expressly referred to in the complaint, and it was therein alleged that the ordinance in legal purview amounted to action by the State impairing the obligations of the contract, embodied in section 9 of the charter, and was hence void because repugnant to the Constitution

of the United States. After answer and due proceedings the case was decided by the trial court in favor of the gas company. On appeal the judgment of the trial court was reversed by the Supreme Court of Minnesota, and a final judgment was ordered against the gas company. To this judgment of the Supreme Court of the State this writ of error is prosecuted.

Mr. Justice WHITE, after stating the case, delivered the opinion of the Court.

The Supreme Court of Minnesota held that the charter of the gas company did not impose on the city the obligation to pay the interest on the cost of constructing the lamps not used. Construing the whole charter, the court decided that as it provided for contracts between the parties from time to time for the supply of lights, that the sole obligation imposed was that the interest on the cost of the construction of the lamps should be paid by the city only during the time it was agreed that the lamps should be used and not during the life of the charter. We excerpt in the margin an extract from the opinion of the Supreme Court of Minnesota which more fully expresses the reasoning by which the court sustained the construction of the contract which was expounded.*

Because the Supreme Court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no Federal question is presented for decision. Where subsequent State legislation is asserted to be repugnant to the Con-

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*"It seems to us that it would be unreasonable to hold that if at the inception of the fifty years which this charter was to run the city had ordered such street lamps to be erected, had used them ten years under a contract for lighting the streets which expired at the end of that time, and then, on account of some such contingency, had ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, connecting pipes and meters for forty years more, and to permit them to encumber the streets for that length of time, although the city had not a particle of use for such street lamps during all of that time. Again, it would be unreasonable to hold that the city council might, under section 9, compel the gas company to erect street lamps, and then, after using them a month or a year, abandon the use of gas for street lighting purposes, and thereby avoid all liability to pay any other compensation for the erection and use of the street lamps than eight per cent. per annum, during such use, on the cost of erecting the same.

"But we are of the opinion that section 9 does not give the council the right in its discretion to compel the erection of street lamps regardless of how long the city may use them, and without protecting the gas company by stipulating a length of time during which the city shall use them.

"Section 9 provides that whenever the city 'by resolution of its board of aldermen directs lamps to be erected and lighted in the streets of the city,' the gas company shall erect the same and keep them in repair; but, as we have seen, the

stitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the State court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired, never arose. (*Houston & Texas Central Rd.* v. *Texas*, 177 U. S. 66, 77, and cases cited.) In cases of this nature, therefore, the questions to be considered are these: Was there a contract, and if yes, what obligations arose from it? and, Has there been State legislation impairing the contract obligations? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation. As, however, the authority to review the judgment of the Supreme Court of Minnesota in this case, and in doing so to interpret the contract and enforce its obligations, arises solely because of the assertion that the obligations of the contract have been impaired by subsequent legislation, we will first consider whether, under any view which may be taken of the contract, there is shown on this record any act of State legislation which can be properly said to have impaired the obligations of the contract in the constitutional import of these words. That is to say, we propose first to consider, even although it be conceded *arguendo* that the Supreme Court of the State of Minnesota erroneously decided that the contract relied upon did not impose the duty on the city to pay interest on the cost of construction of the unused gas lamps, whether there has been any State legislation impairing the obligation of such contract. Whilst it is not pretended that there is any law of the State of Minnesota by which the obligation of the contract was impaired, it is asserted that such conse-

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city has no power under the charter to compel the streets to be lighted except by making for that purpose a contract voluntary as to both parties. When making such a contract the gas company can refuse to contract for lighting any street lamps except those already erected, and before the city can compel the erection of more lamps it must first make a contract for lighting them. In making such a contract, the gas company can protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the eight per cent. per annum to be paid during that time will remunerate the gas company for erecting the lamps. We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to pay.

"This, in our opinion, is the more reasonable and proper construction of the provision of the charter, and the one which should be adopted. We therefore hold that the city is not liable for such compensation for street lamps after it has ceased the use of the same and abandoned the use of gas in lighting its streets."

quence results from the ordinance adopted by the municipal council of the city of St. Paul, the text of which ordinance has been reproduced in the statement of the case.

It is no longer open to question that "a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the Constitution of the United States." (*New Orleans Waterworks* v. *Louisiana Sugar Company*, 125 U. S. 18, 31; *Hamilton Gas Light Company* v. *Hamilton City*, 146 U. S. 258; *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1.)

Referring to the ordinance in question from the provisions of which it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to, the first, a command by the city to the gas company to "forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;" and, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If then there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions just referred to. Now, it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provision of the ordinance that the same result must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay,

and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error.

It is argued, however, that as under the charter of the city of St. Paul, the comptroller of the city was empowered to audit the claims of the gas company as a prerequisite to the appropriation by the city council of the necessary money to pay such claims, therefore the ordinance, to the extent that it deprived the comptroller of the power to audit, divested him of an attribute which he could otherwise have exercised on behalf of the claim if he favored its payment, and hence the ordinance impaired the contract obligations. But it is not pretended that the effect of the auditing by the comptroller would have been to authorize the payment of the claim, or indeed that it was anything but advisory; since even after he had audited, the payment could not have been procured without the passage of an appropriation by the council for that purpose. A large number of cases were cited in the argument at bar, under the assumption that they sustain the proposition that wherever a mere denial of contract liability is made by a municipality, that such denial is an impairment of the obligations of the contract, since it is a refusal to comply with the contract and hence is a disregard of the obligations which the contract created. We do not stop to refer to all these cases thus relied upon, because we think it results from the statement of the proposition that it is without foundation. However, we briefly advert to a few of the cases to show how inapposite they are to the proposition which they are cited to maintain. Thus, in *Murray* v. *Charleston*, (96 U. S. 432,) the decision which was under review had given effect to an ordinance of the city of Charleston deducting a sum of taxation from the bonds held by the complainant. In *Walla Walla* v. *Walla Walla Water Company*, (172 U. S. 1,) the decision

of the State court gave effect to a municipal ordinance which provided for the construction by the city of a new waterworks plant which was to become a competitor with the contracting company. In *McCullough* v. *Virginia*, (172 U. S. 102,) it was expressly held, although the State court had rested its decision on the ground that there was no contract, in view of the previous decisions of this court and of the State court, relating to the contract which was under consideration, that the necessary effect of the ruling was in substance to give effect to an act of the legislature of Virginia, passed subsequent to the contract, and which impaired its obligations. In *Houston & Texas Central Railroad Co.* v. *Texas*, (177 U. S. 74,) this court, after noticing the fact that the State court had decided the case "without reference to the act of 1870 which the plaintiff in error [the railroad company] alleges to be an impairment of the contract set up by it in the pleadings," said: "We think the judgment of the court did give effect to that act." And the soundness of this conclusion the opinion then proceeded to demonstrate, it being apparent that the legislative act of impairment which the court found had been given effect to by the State decision was not a mere denial of liability, but amounted to an impairment of the substantial rights conferred by the contract.

As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiction of this court.

Dismissed for want of jurisdiction.

True copy.

Test:

Clerk Supreme Court, U. S.